DOCKET

No. 07-9995
Title: Michael Rivera, Petitioner
v.
Illinois
Docketed: March 21, 2008
Lower Ct: Supreme Court of Illinois
Case Nos.: (98609)
Decision Date: November 29, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 27 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 21, 2008)
Apr 15 2008	Order extending time to file response to petition to and including May 21, 2008.
May 22 2008	Order further extending time to file response to petition to and including June 20, 2008.
Jun 17 2008	Brief of respondent Illinois in opposition filed.
Jul 2 2008	Reply of petitioner Michael Rivera filed. (Distributed)
Jul 3 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 17 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including December 5, 2008.
Oct 21 2008	Brief amicus curiae of Wayne County Michigan in support of respondent filed.
Oct 29 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Nov 19 2008	The time within which to file respondent's brief on the merits is extended to and including January 21, 2009.
Dec 4 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Dec 5 2008	Joint appendix filed.
Dec 5 2008	Brief of petitioner Michael Rivera filed.
Dec 8 2008	SET FOR ARGUMENT ON Monday, February 23, 2009.
Dec 12 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 19 2008	CIRCULATED.
Dec 23 2008	Record received from the Supreme Court of Illinois. (1 box)
Jan 21 2009	Brief of respondent Illinois filed. (Distributed)
Jan 27 2009	Brief amici curiae of Florida, et al. filed. (Distributed)
Jan 28 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 28 2009	Brief amicus curiae of United States filed. (Distributed)
Jan 28 2009	Brief amicus curiae of National District Attorneys Association filed. (Distributed)
Jan 28 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Feb 12 2009	Reply of petitioner Michael Rivera filed. (Distributed)
Feb 20 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Feb 23 2009 Argued. For petitioner: James K. Leven, Chicago, Ill. For respondent: Michael A. Scodro, Solicitor General, Chicago, Ill.; and Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Name	Address	Phone
Attorneys for Petitioner:		
James K. Leven Counsel of Record Party name: Michael Rivera	203 North LaSalle Street, Ste. 2100 Chicago, IL 60601	(312) 558-1638
Attorneys for Respondent:		
Michael A. Scodro Counsel of Record Party name: Illinois	Solicitor General Office of Attorney General 100 West Randolph Street, 12th Fl. Chicago, IL 60601 mscodro@atg.state.il.us	(312) 814-3698
Alan J. Spellberg Party name: Illinois	Assistant State's Attorney 309 Richard J. Daley Center 50 West Washington Street Chicago, IL 60602 aspellb@cookcountygov.com	(312) 603-5496
Other:		
Timothy A. Baughman Party name: Wayne County Michigan in support of respondent	Chief of Research, Training and Appeals Wayne County Prosecutor's Office 1441 St. Antoine 11th Floor Detroit, MI 48226	(313) 224-5792
Linda T. Coberly Party name: National District Attorneys Association	Winston & Strawn LLP 35 West Wacker Drive Chicago, IL 60601	(312) 558-5600
Abigail K. Hemani Party name: National Association of Criminal Defense Lawyers	Goodwin Proctor LLP 620 Eighth Avenue New York, NY 10018	(212) 813-8800

Edwin S. Kneedler	Acting Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217

Party name: the United States

Scott D. Makar	Solicitor General Office of the Attorney General PL-01, The Capitol Tallahassee, FL 32399 scott.makar@myfloridalegal.com	(850) 414-3300

Party name: Florida, et al.,

Kent S. Scheidegger	Criminal Justice Legal Foundation 2131 L Street Sacramento, CA 95816 cjlf@cjlf.org	(916) 446-0345

Party name: Criminal Justice Legal Foundation

PETITION FOR WRIT OF CERTIORARI

120

(12)

No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

ROBERT N. HOCHMAN
AARON S. MANDEL
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

February 27, 2008

QUESTION PRESENTED

Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those appearing in the caption to this petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	12
CONCLUSION	25
APPENDIX	
People v. *Rivera*, 879 N.E.2d 876 (Ill. 2007)	1a
People v. *Rivera*, 852 N.E.2d 771 (Ill. 2006)	18a
People v. *Rivera*, 810 N.E.2d 129 (Ill. App. Ct. 2004)	40a
Judgment of the Cook County Circuit Court (2000)	57a

TABLE OF AUTHORITIES

CASES Page

Aki-Khuam v. *Davis*, 339 F.3d 521 (7th Cir. 2003) 23
Angus v. *State*, 695 N.W.2d 109 (Minn. 2005) 4
Arizona v. *Fulminante*, 499 U.S. 279 (1991) .. 13, 17, 21
Batson v. *Kentucky*, 476 U.S. 79 (1986) 18
Blake v. *State*, 121 P.3d 567 (Nev. 2005), *cert. denied*, 126 S. Ct. 2030 (2006) 5
Busby v. *State*, 894 So. 2d 88 (Fla. 2004) 5
Commonwealth v. *Leahy*, 838 N.E.2d 1220 (Mass. 2005) 5
Dunlap v. *People*, 173 P.3d 1054 (Colo. 2007), *cert. denied*, 128 S. Ct. 882 (2008) .. 5
Ferguson v. *State*, 33 S.W.3d 115 (Ark. 2000) 5, 6, 16
Frazier v. *United States*, 335 U.S. 497 (1948) 19, 24
Fuson v. *State*, 735 P.2d 1138 (N.M. 1987) .. 5
Georgia v. *McCullom*, 505 U.S. 42 (1992) 3, 19, 24
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 17, 18
Golden v. *State*, 127 P.3d 1150 (Okla. Crim. App.), *cert. denied*, 126 S. Ct. 2971 (2006) 5, 6
Grandison v. *State*, 670 A.2d 398 (Md. 1995) 5, 6, 16
Gray v. *Mississippi*, 481 U.S. 648 (1987) 21, 22
Holder v. *State*, 124 S.W.3d 439 (Ark. 2003) 4, 6, 16

TABLE OF AUTHORITIES—continued

	Page
Holland v. *Illinois*, 493 U.S. 474 (1990)	19
Kirk v. *Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995)	5
Kirkland v. *State*, 560 S.E.2d 6 (Ga. 2002)	5
Klahn v. *State*, 96 P.3d 472 (Wyo. 2004)	5, 21
Lewis v. *United States*, 146 U.S. 370 (1892)	13
McIlwain v. *United States*, 464 U.S. 972 (1983)	20
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	18
Neder v. *United States*, 527 U.S. 1 (1999)	12, 23
Parker v. *State*, 778 A.2d 1096 (Md. 2001)	4, 6, 16
People v. *Bell*, 702 N.W.2d 128 (Mich. 2005), *amended on other grounds*, 704 N.W.2d 69 (Mich. 2005)	4, 13
Pointer v. *United States*, 151 U.S. 396 (1894)	19
Ross v. *Oklahoma*, 487 U.S. 81 (1988)	19, 20, 23, 24
Saldano v. *State*, 232 S.W.3d 77 (Tex. Crim. App. 2007), *cert. denied*, 2008 WL 782063 (U.S. Feb. 25, 2008)	6
State v. *Ackward*, 128 P.3d 382 (Kan. 2006)	5
State v. *Barnville*, 445 A.2d 298 (R.I. 1982)	6
State v. *DiFrisco*, 645 A.2d 734 (N.J. 1994)	5
State v. *Fire*, 34 P.3d 1218 (Wash. 2001)	5, 6, 16
State v. *Group*, 781 N.E.2d 980 (Ohio 2002)	5
State v. *Hickman*, 68 P.3d 418 (Ariz. 2003)	5, 21, 23
State v. *Kauhi*, 948 P.2d 1036 (Haw. 1997)	5
State v. *Lambert*, 830 A.2d 9 (Vt. 2003)	6
State v. *Latour*, 886 A.2d 404 (Conn. 2005)	4

TABLE OF AUTHORITIES—continued

Page

State v. *Lindell*, 629 N.W.2d 223 (Wis. 2001) 5, 15, 23

State v. *Mann*, 959 S.W.2d 503 (Tenn. 1997) 5

State v. *Neuendorf*, 509 N.W.2d 743 (Iowa 1993) 5

State v. *Reiners*, 664 N.W.2d 826 (Minn. 2003) 13

State v. *Thompson*, 552 N.W.2d 386 (N.D. 1996) 5, 14

State v. *Verhoef*, 627 N.W.2d 437 (S.D. 2001) 6

State v. *Vreen*, 26 P.3d 236 (Wash. 2001).... 4, 6, 13, 14, 16

State v. *Vreen*, 994 P.2d 905 (Wash. Ct. App. 2000) 21

State v. *Wach*, 24 P.3d 948 (Utah 2001)..... 5

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) ... 18, 22, 23

Swain v. *Alabama*, 380 U.S. 202 (1965), *overruled by Batson* v. *Kentucky*, 476 U.S. 79 (1986)..... 6, 11, 14, 19

Tumey v. *Ohio*, 273 U.S. 510 (1927)..... 18, 22, 23

United States v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1996) 4, 13, 14, 21

United States v. *Blanding*, 250 F.3d 858 (4th Cir. 2001) 4

United States v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) 17, 18, 20

TABLE OF AUTHORITIES—continued

Page

United States v. *Johnson*, 495 F.3d 951 (8th Cir. 2007) 5
United States v. *Martinez-Salazar*, 528 U.S. 304 (2000) ..... *passim*
United States v. *McFerron*, 163 F.3d 952 (6th Cir. 1998) 4
United States v. *Polichemi*, 219 F.3d 698 (7th Cir. 2000) 5
United States v. *Rubin*, 37 F.3d 49 (2d Cir. 1994) 5
United States v. *Sanchez-Hernandez*, 507 F.3d 826 (5th Cir. 2007) 5, 14
United States v. *Young*, 470 U.S. 1 (1985) .. 20
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 18
Waller v. *Georgia*, 467 U.S. 39 (1984) 18
Wardius v. *Oregon*, 412 U.S. 470 (1973) 23
Watley v. *Williams*, 218 F.3d 1156 (10th Cir. 2000) 5
Witherspoon v. *Illinois*, 391 U.S. 510 (1968) .. 20

CONSTITUTION

U.S. Const. amend. VI 2
U.S. Const. amend. XIV 2

IN THE

Supreme Court of the United States

No. 07-

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Rivera respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois in this case.

OPINIONS BELOW

The decision of the Illinois Supreme Court sought to be reviewed, Appendix ("App.") 1a-17a, is reported at *People* v. *Rivera*, 879 N.E.2d 876 (Ill. 2007). The previous decision of the Illinois Supreme Court, App. 18a-39a, is reported at 852 N.E.2d 771 (Ill. 2006). The opinion of the Illinois Appellate Court, App. 40a-56a, is reported at 810 N.E.2d 129 (Ill. App. Ct. 2004).

The judgment of the Circuit Court of Cook County, App. 57a, is unreported.

JURISDICTION

The opinion and judgment of the Illinois Supreme Court was entered on November 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Michael Rivera was tried before a jury in the Circuit Court of Cook County and convicted of first-degree murder in the shooting death of Marcus Lee. This petition concerns the trial court's decision to seat as a juror Delores Gomez even though defense counsel exercised a peremptory challenge (to which the prosecutor did not object) to strike Ms. Gomez from the jury.

This case presents a mature and deep split of authority on an issue of substantial importance: whether a court's error in denying a peremptory challenge that results in the seating of an objectionable juror (i.e., a juror who should have been excused) requires automatic reversal of a conviction, or whether such an error can and should be examined under the harmless-error standard. The issue frequently arises in two different circumstances.

A trial court may preclude a defendant from exercising a peremptory challenge as to a particular juror because the court erroneously concludes that the challenge was based on racial or gender discrimination—in short, the misapplication of the reverse-*Batson* rule. See *Georgia* v. *McCullom*, 505 U.S. 42, 57 (1992). In such cases, the error puts an individual on the jury who would not have sat but for the error.

The same issue can also arise when a judge errs in rejecting a defendant's for-cause challenge, and so the defendant must waste a peremptory challenge to dismiss the juror that the judge should have dismissed for cause. Such errors sometimes, but not always, result in an individual sitting on the jury who would not have sat but for the error. See *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000). In

some cases, defense counsel uses *all* of his or her allotted peremptory challenges, and indicates that he or she would have exercised a peremptory challenge as to a later juror in the venire but could not because he or she had to waste one on a juror who the judge should have dismissed for cause. In such cases, just as in those where the court has misapplied the reverse *Batson* rule, an individual sits on the jury who would not have sat but for trial court's error.

The courts have split seven to two in cases like this case where the automatic reversal question arises out of the erroneous application of the reverse-*Batson* rule. Seven courts have held that automatic reversal is appropriate. *United States* v. *Blanding*, 250 F.3d 858, 861 (4th Cir. 2001); *United States* v. *McFerron*, 163 F.3d 952, 955 (6th Cir. 1998); *United States* v. *Annigoni*, 96 F.3d 1132, 1141-47 (9th Cir. 1996) (en banc); *Angus* v. *State*, 695 N.W.2d 109, 118 (Minn. 2005); *Holder* v. *State*, 124 S.W.3d 439, 452 (Ark. 2003); *Parker* v. *State*, 778 A.2d 1096, 1102-03 (Md. 2001); *State* v. *Vreen*, 26 P.3d 236, 238-40 (Wash. 2001) (en banc). Only the Michigan Supreme Court, *People* v. *Bell*, 702 N.W.2d 128, 138-41 (Mich. 2005), *amended on other grounds*, 704 N.W.2d 69 (Mich. 2005), along with the Illinois Supreme Court in this case have held that harmless-error analysis applies.[1]

The courts have split nineteen to twelve when the same issue arises out of the erroneous denial of a for-

---

[1] The Supreme Court of Connecticut held that a reverse-*Batson* error regarding an alternate juror was subject to harmless-error analysis, but its ruling was largely based on the juror's status as an alternate. *State* v. *Latour*, 886 A.2d 404, 414-15 (Conn. 2005). The court in *Latour* expressed no opinion as to whether an error resulting in an objectionable juror sitting on the petit jury would similarly be subject to harmless error review. *Id.* at 415.

cause challenge. Nineteen courts have concluded that, in such cases, harmless-error analysis applies. *United States* v. *Sanchez-Hernandez*, 507 F.3d 826, 829-31 (5th Cir. 2007); *United States* v. *Johnson*, 495 F.3d 951, 974-75 (8th Cir. 2007); *Watley* v. *Williams*, 218 F.3d 1156, 1160 (10th Cir. 2000); *United States* v. *Polichemi*, 219 F.3d 698, 710-11 (7th Cir. 2000); *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994); *State* v. *Ackward*, 128 P.3d 382, 400 (Kan. 2006); *Blake* v. *State*, 121 P.3d 567, 578 (Nev. 2005), *cert. denied*, 126 S. Ct. 2030 (2006); *Busby* v. *State*, 894 So. 2d 88, 92 (Fla. 2004) (per curiam) (but automatically reversing based on state constitutional protections); *Klahn* v. *State*, 96 P.3d 472, 480-84 (Wyo. 2004); *State* v. *Hickman*, 68 P.3d 418, 424 (Ariz. 2003); *State* v. *Wach*, 24 P.3d 948, 954-57 (Utah 2001); *State* v. *Fire*, 34 P.3d 1218, 1222, 1225 (Wash. 2001) (en banc); *State* v. *Lindell*, 629 N.W.2d 223 (Wis. 2001); *Ferguson* v. *State*, 33 S.W.3d 115, 125 (Ark. 2000); *State* v. *Mann*, 959 S.W.2d 503, 533-34 (Tenn. 1997); *State* v. *Thompson*, 552 N.W.2d 386, 390 (N.D. 1996); *Grandison* v. *State*, 670 A.2d 398, 417-19 (Md. 1995); *State* v. *DiFrisco*, 645 A.2d 734, 751-54 (N.J. 1994); *State* v. *Neuendorf*, 509 N.W.2d 743, 746-47 (Iowa 1993).

By contrast, twelve courts have held that the erroneous denial of a for-cause challenge requires automatic reversal. *Kirk* v. *Raymark Indus., Inc.*, 61 F.3d 147, 158-60 (3d Cir. 1995); *Dunlap* v. *People*, 173 P.3d 1054, 1091 (Colo. 2007), *cert. denied*, 128 S. Ct. 882 (2008); *Kirkland* v. *State*, 560 S.E.2d 6, 8 (Ga. 2002); *State* v. *Kauhi*, 948 P.2d 1036, 1041 (Haw. 1997); *Commonwealth* v. *Leahy*, 838 N.E.2d 1220, 1233 (Mass. 2005); *Fuson* v. *State*, 735 P.2d 1138, 1139-40 (N.M. 1987); *State* v. *Group*, 781 N.E.2d 980, 991 (Ohio 2002); *Golden* v. *State*, 127 P.3d 1150, 1154

(Okla. Crim. App.), *cert. denied*, 126 S. Ct. 2971 (2006); *State* v. *Barnville*, 445 A.2d 298, 301 (R.I. 1982); *State* v. *Verhoef*, 627 N.W.2d 437, 440-43 (S.D. 2001); *Saldano* v. *State*, 232 S.W.3d 77, 93 (Tex. Crim. App. 2007), *cert. denied*, 2008 WL 782063 (U.S. Feb. 25, 2008) (No. 07-7815); *State* v. *Lambert*, 830 A.2d 9, 13 (Vt. 2003).

All told, 18 courts have concluded that harmless-error analysis applies to the wrongful denial of a peremptory challenge that results in an objectionable juror being seated while 16 courts have concluded that such an error requires automatic reversal. Highlighting the confusion surrounding this question, three state courts of last resort—Washington, Arkansas, and Maryland—have concluded that harmless-error analysis applies when the juror is seated because of the misapplication of the for-cause rule, while the misapplication of the reverse-*Batson* rule requires automatic reversal. Compare *Fire*, 34 P.3d at 1222, with *Vreen*, 26 P.3d at 240; compare *Holder*, 124 S.W.3d at 452, with *Ferguson*, 33 S.W.3d at 125; compare *Parker*, 778 A.2d at 1102-03, with *Grandison*, 670 A.2d at 418-19.

This Court has never squarely ruled on the question, yet its comments in *dicta* demonstrate that the split is unlikely to be resolved without this Court's further intervention. In *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court stated unequivocally that automatic reversal was required when a defendant's right to peremptory challenges was impaired or denied. But more recently in *Martinez-Salazar*, 528 U.S. 304 at 317 n.4, this Court emphasized that the assertion of the automatic-reversal rule in *Swain* was *dicta* and offered at a time prior to the modern adoption of a general preference

for harmless-error analysis. As Justice Souter observed, in *Martinez-Salazar*, this Court has yet to determine whether a court's error in denying a peremptory challenge causing the challenged venire member to sit on the jury warrants automatic reversal. *Id.* at 317-18 (Souter, J., concurring).

The depth of the split of authority also demonstrates both that the issue is recurring and important. The use of peremptory challenges reflects a venerable tradition through which the parties participate in generating a fair and impartial jury. The power the parties have over the composition of the jury through peremptory challenges has long been recognized as substantial. If, as happened here, one side is given a greater ability to weed out those elements of the jury pool that it believes may tilt jurors in favor of the other side, then the critical fact-finding structure of the trial becomes distorted. Much like trial before a biased tribunal and other errors that affect how the evidence presented at trial is evaluated, which this Court has clearly indicated warrant automatic reversal, an error that so distorts the fact-finding process is not amenable to harmless-error analysis. The Illinois Supreme Court's ruling to the contrary warrants this Court's review.

1. When Delores Gomez was seated in the jury venire, petitioner's trial counsel questioned her. Ms. Gomez was a "business office supervisor at Cook County Hospital's outpatient orthopedic clinic." Pet. App. 5a, 21a. Counsel elicited from Ms. Gomez that she has contact with the victims of violent crime, including gunshot wounds, which Cook County Hospital sees unusually often. *Id.* Ms. Gomez indicated that her experiences would not prevent her from judging the evidence fairly.

At the completion of the questioning, counsel for petitioner announced his intention to use a peremptory challenge to strike Ms. Gomez from the jury. Counsel for respondent did not object. Both respondent and petitioner had been given the opportunity to exercise seven peremptory challenges during the process of jury selection. Had it been allowed, Ms. Gomez would have been the fourth venire member that counsel for petitioner struck pursuant to that right.

Instead of allowing the challenge, the trial court, *sua sponte*, ordered counsel for both sides to chambers and asked Ms. Gomez to remain in the jury box until they returned. Pet. App. 5a, 21a. The trial court then asked petitioner's counsel to articulate the reason why he was choosing to strike Ms. Gomez from the jury. After defense counsel objected that he had no obligation to offer an explanation, the trial court indicated that it was raising, on Ms. Gomez's behalf, a reverse-*Batson* challenge to the peremptory challenge. Defense counsel then explained that he was "'pulled in two different'" directions by this potential juror because on the one hand she has an Hispanic surname (like petitioner) but on the other hand she works in a setting that could expose her far more than others to the victims of violent crime and gunshot wounds. *Id.* The trial court interrupted to point out that Ms. Gomez "appears" to be African-American and then asked to hear from respondent, who had, as yet, said nothing. *Id.* At that point, counsel for respondent indicated that the explanation from petitioner's counsel was insufficient. *Id.*

The trial court determined that counsel for petitioner had not provided an adequate explanation, and concluded that the attempt to excuse Ms. Gomez from the jury was discriminatory. Pet. App. 6a, 22a.

The trial court allowed counsel for petitioner to continue questioning Ms. Gomez in chambers, who continued to express her view that she could fairly evaluate the evidence. Counsel for petitioner thereafter repeated his request to strike Ms. Gomez. The trial court again denied the request. *Id.* at 6a, 22a-23a.

Ms. Gomez was seated as a juror with full knowledge that petitioner's counsel had attempted to strike her. She was selected the foreperson of the jury. The jury found petitioner guilty, and the trial court sentenced him to 85 years in prison.

2a. The Illinois Appellate Court affirmed Rivera's conviction and sentence, rejecting Rivera's contention that the trial judge erred in denying his peremptory challenge to Ms. Gomez. Pet App. 49a. The Illinois Supreme Court, however, did not affirm in its initial review. Instead, it remanded the case back to the trial court. Based on the record before it at that time, the Illinois Supreme Court could not discern from the trial court's decision whether there was a sufficient prima facie case of discrimination, or even what the alleged basis of discrimination was (race or gender or something else) to warrant rejecting counsel for petitioner's peremptory challenge to Ms. Gomez. *Id* at 38a.

On remand, the trial judge attempted to articulate the grounds for its conclusion that a prima facie case of unlawful discrimination had been established at the time the court had required counsel for petitioner to explain why he was attempting to excuse Ms. Gomez from the jury. The trial court on remand expressed the view that he had denied the peremptory challenge because he concluded that defense counsel's true reason for striking Gomez was her gender. Pet App. 8a.

On review of the supplemented record, the Illinois Supreme Court affirmed petitioner's conviction. However, it did not conclude that the trial court had properly refused to allow petitioner to exercise a peremptory challenge to excuse Ms. Gomez from the jury. To the contrary, the Illinois Supreme Court concluded that the trial court should have allowed petitioner's peremptory challenge. There was no prima facie case of either race or gender discrimination. Pet. App. 9a. The "record [on remand] fail[ed] to support a *prima facie* case of discrimination *of any kind*." *Id.* Ms. Gomez should never have sat on petitioner's jury.

2b. Nonetheless, the Illinois Supreme Court affirmed despite the fact that Ms. Gomez should not have served on the jury because it concluded that the wrongful denial of a peremptory challenge did not require automatic reversal. The court concluded that the error was subject to harmless-error review, and, further, that in this case the error was harmless.

As the Illinois Supreme Court observed, this Court has described the role of peremptory challenges as a "'necessary part of [a] trial by jury'" system, one with a "'venerable'" tradition. Pet. App. 10a (quoting *Holland* v. *Illinois*, 493 U.S. 474, 481, 484 (1990)). Indeed, the Illinois Supreme Court had itself previously observed in its initial review that the opportunity to use peremptory challenges is "one of the most important ... rights secured to the accused." *Id.* (quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1894)) (internal quotation marks omitted).

Yet the Illinois Supreme Court viewed this Court's more recent cases as having discarded that tradition. The Illinois Supreme Court argued that this Court has rejected the view that the right to peremptory challenges is itself a component of the constitutional

right to an impartial jury. Pet. App. 10a (citing *Stilson* v. *United States*, 250 U.S. 583 (1919)).

The Illinois Supreme Court placed special emphasis on the footnote in *Martinez-Salazar* discussing whether the wrongful denial of a peremptory challenge is subject to harmless-erorr review. Pet. App. 11a. In *Swain*, 380 U.S. at 219, this Court had stated that the "denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." *Martinez-Salazar* called that unequivocal statement into question, characterizing the statement as "unnecessary to the decision" in *Swain* and based on cases decided before the Court adopted its modern approach to harmless-error review. 528 U.S. at 317 n.4.

The Illinois Supreme Court read the footnote in *Martinez-Salazar* as dispositive. It concluded that the law is now clear that the wrongful denial of a peremptory challenge does not require automatic reversal, but should be reviewed under the harmless-error standard. Pet. App. 11a (stating that *Swain* is "no longer good law" on the question). It concluded that the footnote makes "explicit" that automatic reversal for the wrongful denial of a peremptory challenge has been rejected. *Id.* at 12a.

The Illinois Supreme Court went on to conclude that the wrongful denial of a peremptory challenge is not "structural" error warranting automatic reversal because this Court has not included it in any list of such errors in the past. *Id.* While acknowledging that trial before a biased tribunal would warrant automatic reversal, the Illinois Supreme Court concluded that because Ms. Gomez did not need to be dismissed for cause, there was no basis for likening the error here to such a case. *Id.*

Finally, the Illinois Supreme Court concluded that harmless error analysis under the standard enunciated by this Court in *Neder* v. *United States*, 527 U.S. 1 (1999), was both possible and compelled a finding that the error was, in fact harmless. The Illinois Supreme Court read *Neder* as an invitation to review all the evidence adduced at trial and to opine whether any rational juror would have acquitted in light of that evidence. *Id.* at 12a-15a. Mimicking the rationale one might imagine being offered by a trier of fact, the Illinois Supreme Court declared that "[a]ny inconsistencies in the witnesses' grand jury testimony were insignificant" in light of the evidence of guilt that it deemed "overwhelming." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court's decision deepens an already substantial split of authority regarding whether a court's error in denying a peremptory challenge that results in the seating of an objectionable juror (i.e., one the court should have excused) warrants automatic reversal. Further, the Illinois Supreme Court's explanation for siding with harmless-error analysis erroneously treats this Court as having decided the matter, and ignores the substantial basis for treating such error as "structural" and hence warranting automatic reversal.

1. As noted above, courts have split seven to two in favor of automatic reversal when a defendant is erroneously denied a peremptory challenge by the misapplication of the reverse-*Batson* rule. The Fourth, Sixth and Ninth Circuits, along with the State Supreme Courts in Arkansas, Maryland, Minnesota and Washington, have all required automatic reversal in such circumstances. *Supra* at 4

(citing cases). Only the Michigan Supreme Court in *Bell*, 702 N.W.2d at 138-39, and the Illinois Supreme Court here have applied harmless-error analysis to such a case.

The majority view is well reasoned. First, because there is no record of jury deliberations, "[i]t would be difficult if not impossible for a reviewing court to determine the degree of harm resulting" from the seating of the objectionable juror. *Annigoni*, 96 F.3d at 1145; see also *Vreen*, 26 P.3d at 239; *State* v. *Reiners*, 664 N.W.2d 826, 835 (Minn. 2003). Jury deliberations are, by design, secret; the influence of a particular juror is impossible to discern. And peremptory challenges are based on an often inarticulable sense that something in a particular juror's background or life experiences would lead him or her to be inclined against one's client in light of the facts likely to emerge at trial. *Annigoni*, 96 F.3d at 1144. There is, simply, no way to reconstruct how jury deliberations might have differed if a different juror had sat in place of the objectionable juror. By engaging in harmless error review, the reviewing court would itself undermine the venerable tradition of peremptory challenges articulated by authorities such as Blackstone and Justice Story, who noted that judges were barred at common law from requiring defendants to justify a strike. See *Lewis* v. *United States*, 146 U.S. 370, 376 (1892).

The error at issue here is unlike the typical "trial" error that is quintessentially subject to harmless-error analysis. Trial errors involve, for example, the erroneous introduction of evidence (such as an involuntary confession, *Arizona* v. *Fulminante*, 499 U.S. 279, 307-08 (1991) (Rehnquist, J., dissenting in part)), and do not go to the composition of the tribunal evaluating the evidence. "[U]nlike typical

trial errors [subject to harmless error analysis], this error did not 'occur[] during presentation of the case to the jury,'" and the consequence of the error is the ongoing presence of the objectionable juror throughout the trial. *Annigoni*, 96 F.3d at 1144 (quoting *Fulminante*, 499 U.S. at 307) (alteration in original).

Courts favoring automatic reversal have noted that this Court in *Swain* stated that "[t]he denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice." 380 U.S. at 219; see, *e.g.*, *Annigoni*, 96 F.3d at 1136-37; *Vreen*, 26 P.3d at 239-40. And while this Court in *Martinez-Salazar* has made clear that the statement in *Swain* is not binding authority, 528 U.S. at 317 n.4, those courts that have addressed the issue since *Martinez-Salazar* have observed that *Martinez-Salazar* did not hold that harmless-error analysis is required in such cases. After all, the defendant in *Martinez-Salazar* "was not denied the use of any of his peremptory challenges, and the offending juror did not sit on the jury," while the defendant in a reverse-*Batson* error case is denied the use of a peremptory strike against a particular objectionable juror, who thus sits on the jury. *Vreen*, 26 P.3d at 238.

The Illinois Supreme Court's rationale is directly contrary to those courts that have held that automatic reversal is warranted. Unlike other courts, the Illinois Supreme Court has concluded that *Martinez-Salazar* is decisive and requires the application of harmless-error analysis. Pet. App. 11a-12a; see also *Sanchez-Hernandez*, 507 F.3d at 829-30 (holding that *Martinez-Salazar* decided this issue); *Thompson*, 552 N.W.2d at 388 (holding that *Ross* governs the erroneous deprivation of a peremptory

challenge); *Lindell*, 629 N.W.2d at 236. Further, the Illinois Supreme Court concluded that the error was not "structural" simply because this Court has yet to say that the error is "structural" and without considering the fact that the error went to the composition of the jury itself. Pet. App. 12a.

If the question presented arose *only* in the context of the erroneous application of the reverse-*Batson* rule, this Court's review would be warranted in light of the depth of the seven to two split. But, in fact, this is not the only context in which the issue arises. Justice Souter's concurrence in *Martinez-Salazar* recognized that the issue can also arise when a for-cause challenge is erroneously denied, prompting a defendant curatively to exercise a peremptory challenge in order to strike the objectionable juror. In such cases, where the defendant exhausted his allotment of peremptory challenges and the record shows that he would have used the one he wasted to strike a venire member who was seated as a juror, a court must decide whether to apply harmless-error analysis or automatic reversal. See *Martinez-Salazar*, 528 U.S. at 317-18 (Souter, J., concurring).

The fact that the issue arises in multiple contexts makes this Court's review even more urgent because the question is likely to arise frequently, as a review of the caselaw confirms. Twelve courts have concluded that automatic reversal is required when an objectionable juror is seated due to an erroneous rejection of a defendant's for-cause challenge. The United States Court of Appeals for the Third Circuit, along with the state courts of last resort in Colorado, Georgia, Hawaii, Massachusetts, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, and Vermont have so held. *Supra* at 5-6 (citing cases). The alternate view, applying harmless-error analysis,

finds nineteen supporters in the context of an erroneous rejection of a defendant's for-cause challenge. The United States Courts of Appeals for the Fifth, Eighth, Seventh, Tenth and Second Circuits, as well as the state courts of last resort in Arizona, Arkansas, Florida, Iowa, Kansas, Maryland, Nevada, New Jersey, North Dakota, Tennessee, Utah, Washington, Wisconsin and Wyoming have so held. *Supra* at 5 (citing cases).[2]

The deep split of authority will not be resolved without further guidance from this Court. This Court has made clear in *Martinez-Salazar* that *Swain*'s clear preference for automatic reversal is not binding. 528 U.S. at 317 n.4. But *Martinez-Salazar* left the question open because it was not properly presented there. *Id.*; see *id.* at 317-18 (Souter, J., concurring). This case provides precisely the vehicle that this Court has been lacking. A specific juror was seated at petitioner's trial who, were it not for the misapplication of the reverse-*Batson* rule that deprived petitioner of the use of his peremptory challenge, would have been dismissed.

Because the lower courts are deeply divided, and this Court's decisions provide no binding resolution, this Court should review this case and clarify that

---

[2] As noted above, three state courts of last resort, Washington, Maryland and Arkansas, have ruled in opposite directions depending on the context in which the wrongful denial of the peremptory challenge arose. *Supra* at 6 (citing cases). Further indicating the depth of confusion, none of those courts has even noted the contradiction or cited its earlier ruling in the later cases. *See Fire*, 34 P.3d at 1222, 1225 (failing to note court's precedent in *Vreen*, 26 P.3d 236); *Holder*, 124 S.W.3d at 452 (failing to note court's precedent in *Ferguson*, 33 S.W.3d 115); *Parker*, 778 A.2d at 1102-03 (failing to note court's precedent in *Grandison*, 670 A.2d 398).

automatic reversal is required when the wrongful denial of a peremptory challenge leads to the seating of a juror who the defendant would have had dismissed.

2. Resolution of this issue goes to the heart of a fair trial process. The reasons for concluding that harmless-error analysis applies in the circumstances presented here, including those presented by the Illinois Supreme Court below as well as other courts, have failed to properly consider how this Court determines whether an error is "structural" and hence warrants automatic reversal. A more thorough review of this Court's automatic reversal cases would both highlight the importance of the issue—which strikes at the heart of the very structure we use to determine guilt and innocence—and demonstrate the Illinois Supreme Court's error.

2a. This Court has recognized a distinction between "trial errors" and "structural defects." *Fulminante*, 499 U.S. 279 at 307-10 (Rehnquist, J., dissenting in part). Most types of errors are trial errors, which "'occur[] during presentation of the case to the jury' and may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2563-64 (2006) (quoting *Fulminante*, 499 U.S. at 307-08) (alteration in original).

Certain errors, by contrast, are structural defects. These errors "'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *Id.*, 126 S. Ct. at 2564 (quoting *Fulminante*, 499 U.S. at 309-10) (alteration in original). Structural defects include those errors resulting in total denial of counsel, *Gideon* v.

Wainwright, 372 U.S. 335, 344 (1963), trial in front of a biased judge, *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927), racial discrimination in the selection of a grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986), denial of a defendant's right of self-representation, *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 (1984), denial of a public trial, *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984), improper jury instructions on the reasonable doubt standard, *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-82 (1993), the erroneous denial of one's counsel of choice, *Gonzales-Lopez*, 126 S. Ct. 2557, and *Batson* errors, where a party uses a peremptory challenge to discriminate on the basis of an impermissible ground. *Batson* v. *Kentucky*, 476 U.S. 79, 99-100 (1986).

Structural defects are subject to automatic reversal because it is impossible to assess whether an error that deformed the very structure for determining guilt or innocence affected the outcome of a case. See *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4 ("we rest our conclusion of structural error upon the difficulty of assessing the effect of the error"); *Vasquez*, 474 U.S. at 263 ("when a petit jury has been selected upon improper criteria ... we have required reversal of the conviction because the effect of the violation cannot be ascertained); *Waller*, 467 U.S. at 49 n.9 (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). Structural errors thus transcend the evidence presented to the jury. Any effort to evaluate the evidence to determine guilt or innocence in light of a structural error amounts to ignoring the error, rather than ensuring that it did not distort the outcome. Cf. *Tumey*, 273 U.S. at 535 ("No matter

what the evidence was against [defendant], he had the right to have an impartial judge").

2b. The exercise of peremptory challenges is precisely the sort of error that transcends the evidence and frustrates harmless-error review. When the parties are provided the right to exercise peremptory challenges to potential jurors, that right has a profound effect on shaping the framework in which the trial proceeds. *Pointer* v. *United States*, 151 U.S. 396, 408 (1894) (calling peremptory challenges "one of the most important of the rights secured to the accused").

Peremptory challenges give counsel for litigants the opportunity to ensure that the composition of the jury excludes those whose background suggests the possibility of a bias against one's client, even if those suggestions fall short of the demanding standard of "for cause" dismissal. "[B]y enabling each side to exclude those jurors it believes will be most partial to the other side," peremptory challenges support "the selection of a qualified *and unbiased* jury." *Holland* v. *Illinois*, 493 U.S. 474, 484 (1990). The "function of the [peremptory] challenge is ... to eliminate extremes of partiality on both sides." *Swain*, 380 U.S. at 219. Peremptory challenges thus play a significant role in ensuring a fair trial by giving the parties a role to play in ensuring that jurors are impartial. See *McCollum*, 505 U.S. at 57 (although not themselves a constitutional right, peremptory challenges are a "state-created means to the constitutional end of an impartial jury and a fair trial"); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (peremptory challenges "are a means to achieve the end of an impartial jury"); *Frazier* v. *United States*, 335 U.S. 497, 505 (1948) ("the right [of peremptory

challenges] is given in aid of the party's interest to secure a fair and impartial jury").

If this substantial power is to function properly, *both* sides must have equal opportunity to exercise it. If the defendant is deprived of the same opportunity as the prosecution to participate in evaluating the predilections of potential jurors, then the jury is likely to be more effectively free of potential biases that concern the prosecution than those that concern the defendant. The Due Process Clause requires a framework that does not tilt toward a "tribunal 'organized to convict.'" *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 (1968) (quoting *Fay* v. *New York*, 332 U.S. 261, 294 (1947)); See also *Ross*, 487 U.S. at 96 (Marshall, J., dissenting) ("[i]t cannot seriously be questioned that the loss of a peremptory challenge vis-à-vis the prosecution burdens the defense in pretrial proceedings").

Given the framework-defining role of peremptory challenges, the erroneous denial of a peremptory challenge is, like all structural defects, not amenable to harmless error review because its effect is impossible to assess. See *Gonzalez-Lopez*, 126 S. Ct. at 2564. The deleterious effect of a single objectionable juror on jury deliberations can never be ascertained by a simple review of the record. "Given the delicate dynamics of jury deliberations, it is simply impossible to know the effects [one] juror had on her fellow jurors." *McIlwain* v. *United States*, 464 U.S. 972, 975-76 (1983) (Marshall, J., dissenting from denial of certiorari); see also *United States* v. *Young*, 470 U.S. 1, 34-35 (1985) (Brennan, J., dissenting in part and concurring in part). In this case, the juror who should not have sat not only knew that the defendant had sought to remove her, but was even selected by her fellow jurors as foreperson. Yet, even

under these troubling circumstances, tracing the impact of this particular error is not a matter of "quantitatively assess[ing]" the evidence properly adduced at trial. *Fulminante*, 499 U.S. at 307-08 (Rehnquist, J., dissenting in part). The impact is pervasive and, because of the sanctity of jury deliberations, by design secret. *Annigoni*, 96 F.3d at 1145 ("[t]o subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation"); see also *State* v. *Vreen*, 994 P.2d 905, 910 (Wash. Ct. App. 2000) ("How can an appellate court determine the degree of harm resulting from the participation of any particular juror in the jury's deliberations? There is no record of jury deliberations."). Thus, like all structural errors, this error frustrates harmless-error analysis.[3]

The denial of the right to a peremptory challenge that results in the seating of an objectionable juror fits comfortably within a strand of this Court's decisions that recognizes that errors affecting how the facts at trial are evaluated require automatic reversal. *Gray* v. *Mississippi*, 481 U.S. 648 (1987) (improper exclusion of juror with scruples regarding

---

[3] Some courts have suggested that the wrongful denial of a peremptory challenge that results in the seating of an objectionable juror is not distinguishable from errors that are subject to harmless error review. *See Hickman*, 68 P.3d at 424-25 (listing examples of statutory and constitutional violations subject to harmless error review, such as the deprivation of the defendant's right to be present at jury selection, and the prosecution's improper comment on defendant's failure to testify (citing *Lindell*, 629 N.W.2d at 249 n.16)); *Klahn*, 96 P.3d at 483-84. For the reasons discussed in the text, that is wrong.

the death penalty from capital case); *Sullivan*, 508 U.S. at 281-82 (improper reasonable doubt instruction); *Tumey*, 273 U.S. at 535 (biased judge). Even when the jury that ultimately sits includes no jurors who have been shown to be biased, when, as here, the error relates to "the impartiality of the adjudicator," it concerns "the very integrity of the legal system" and thus "harmless-error analysis cannot apply." *Gray*, 481 U.S. at 668.

The Illinois Supreme Court rejected this view, concluding that harmless-error analysis was both possible to conduct, and led to a finding that the error was harmless. But it failed adequately to address the strong grounds for concluding that automatic reversal is appropriate. The bare fact that this Court has not yet authoritatively declared that the error is subject to automatic reversal means little. See Pet. App. 12a (arguing that this Court has not listed the wrongful denial of peremptory challenges as a "structural" error). This Court has not held that the category of structural errors requiring automatic reversal is closed. To the contrary, as recently as its decision in *Gonzalez-Lopez*, this Court showed that it continues, in appropriate circumstances, to recognize errors as structural.

The Illinois Supreme Court also concluded that harmless-error analysis was not only possible, but that it could review the entire record to determine whether it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Pet. App. 12a-15a (citing *Neder*, 527 U.S. at 18). But the review the Illinois Supreme Court contemplates is actually a wholesale evaluation of *all* the evidence to determine whether there was any rational basis, in its view, for an acquittal. Such a reading of *Neder* destroys the concept of structural

error altogether. Such a review could be undertaken in response to numerous errors that this Court has determined require automatic reversal, including improper use of race in the selection of petit jurors (*Batson*) or grand jurors (*Vasquez*) or an improper instruction on reasonable doubt (*Sullivan*) or even a biased judge (*Tumey*). Whether *Neder* is to be stretched so far as to engulf several of this Court's automatic reversal decisions is a matter only this Court may authoritatively decide.

Other courts have offered additional reasons for choosing harmless-error analysis when a juror sits due to the erroneous denial of a peremptory challenge. None of those rationales withstand scrutiny.

For example, the Arizona Supreme Court reasoned that a statutory violation of the (non-Constitutional) right to peremptory challenges could not plausibly warrant per se reversal when violations of important constitutional rights are reviewed for harmless error. *Hickman*, 68 P.3d at 425. But the wrongful denial of a peremptory challenge is a matter of constitutional significance because the consequent distortion in the power to influence the composition of the jury is a violation of due process. *Aki-Khuam* v. *Davis*, 339 F.3d 521, 529 (7th Cir. 2003); *Lindell*, 629 N.W.2d at 244 ("if the defendant does not receive 'that which state law provides,' a viable due process claim" is created); see *Ross*, 487 U.S. at 91 (with respect to peremptory challenges, holding petitioner "received all that [state] law allowed him, and *therefore* his due process challenge fail[ed] (emphasis added)) (emphasis added); cf. *Wardius* v. *Oregon*, 412 U.S. 470, 474-75 (1973) (although the defendant has no constitutional right to discovery except as to material, exculpatory evidence, due process is violated when

the defendant was required to disclose pre-trial alibi information but the State had no comparable discovery obligation). Further, this Court has long recognized the importance of peremptory challenges in achieving the Sixth Amendment's guarantee of an impartial jury. *McCollum*, 505 U.S. at 57; *Ross*, 487 U.S. at 88; *Frazier*, 335 U.S. at 505-06 & n.11.

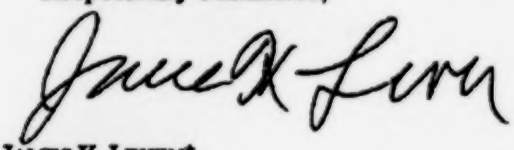
* * *

In the end, numerous factors favor this Court's review. This Court has recently indicated the need to clarify whether automatic reversal applies to the error at issue here. Lower courts are deeply split on the question. The issue is important because it goes to the heart of a fair trial process and the right to an impartial jury. The issue will continue to recur until this Court intervenes. And this case provides an ideal vehicle to address the issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



ROBERT N. HOCHMAN
AARON S. MANDEL
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

February 27, 2008

* Counsel of Record

OPPOSITION BRIEF

120

(13)

NO. 07-9995

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

MICHAEL RIVERA,

Petitioner,

v.

ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN,
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Attorney for Respondent

RICHARD A. DEVINE,
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
JAMES E. FITZGERALD,
ALAN J. SPELLBERG,*
JUDY L. DeANGELIS,
Assistant State's Attorneys,
Of Counsel
*Attorney of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether federal jurisdiction exists to review the Illinois court's finding that the denial of a defendant's statutory right to a peremptory challenge, as provided by Illinois law (725 ILCS 5/115-4(e)), was harmless error, given that there is no federal constitutional right to peremptory challenges.

2. Whether an error that was not of constitutional magnitude – a trial court's erroneous denial of a criminal defendant's right to a peremptory challenge (so-called "reverse-Batson error"), which this Court has held is not a constitutional right – is a structural error that always mandates a new trial, or whether such error may be harmless, particularly in a case where the defendant did not use all of his peremptory challenges, and where the mistakenly-seated juror possessed no indicia of inappropriate discriminatory bias.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Authorities iv

Statement 1

Reasons for Denying the Petition 14

I.

THIS COURT LACKS JURISDICTION WHERE NO FEDERAL QUESTION HAS BEEN PRESENTED SINCE THE PETITIONER'S RIGHT TO PEREMPTORY CHALLENGES IS A STATE STATUTORY RIGHT AND DOES NOT IMPAIR THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY 15

II.

PETITIONER'S ALLEGED 7-2 SPLIT ON THE ISSUE PRESENTED BY THIS CASE IS NOT AS DESCRIBED – ABSENT ONE EARLY OUTLIER, COURTS HAVE AGREED WITH THE ILLINOIS SUPREME COURT THAT HARMLESS ERROR APPLIES TO THE IMPROPER DENIAL OF A PEREMPTORY CHALLENGE 19

A. Cases Decided Before Martinez-Salazar Do Not Conflict With Rivera 19

B. Cases That Fail To Discuss Harmless Error Do Not Conflict With The Instant Illinois Supreme Court Decision 22

C. Cases That Fail to Discuss Martinez-Salazar Do Not Conflict With The Instant Illinois Supreme Court Decision 22

D. Cases that Agree with The Instant Illinois Supreme Court Decision 23

E. In Sum, The Alleged Split Is Illusory 25

III.

THIS CASE IS A POOR VEHICLE FOR DECIDING THE ALLEGED SPLIT BECAUSE IT REQUIRES RESOLUTION OF WHETHER A PRIMA FACIE CASE WAS ESTABLISHED AT TRIAL 26

IV.

THIS CASE IS NOT THE PROPER VEHICLE FOR ADDRESSING THE OTHER SPLIT THAT PETITIONER ALLEGES 29

V.

THE SUPREME COURT OF ILLINOIS CORRECTLY HELD THAT HARMLESS ERROR ANALYSIS APPLIES TO "REVERSE-BATSON" ISSUES AND THAT THE LOSS OF THE USE OF A PEREMPTORY CHALLENGE IS NOT A STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL 31

Conclusion 36

TABLE OF AUTHORITIES

Cases:

Angus v. State, 695 N.W.2d 109 (Minn. 2005) 22,23

Commonwealth v. Carson, 741 A.2d 686 (Pa. 1999) 23

Frazier v. United States, 335 U.S. 497 (1948) 16

Frazier v. New York, 156 Fed.Appx. 423 (2nd Cir. 2005) 24

Georgia v. McCollum, 505 U.S. 42 (1992) 16

Gideon v. Wainwright, 372 U.S. 335 (1963) 31

Haywood v. Portuando, 288 F.Supp. 2d 446 (S.D.N.Y. 2003) 24

Henry v. Mississippi, 397 U.S. 433 (1965) 18

Holder v. State, 124 S.W.3d 439 (Ark. 2003) 22

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 17,27

Johnson v. United States, 520 U.S. 461 (1997) 15,31

Long v. Norris, 2007 U.S. Dist. LEXIS 49883 (E.D. Ark. July 10, 2007) ... 24

McKaskle v. Wiggins, 465 U.S. 168 (1984) 31

Neder v. United States, 527 U.S. 1 (1999) 31

Parker v. State, 778 A.2d 1096 (Md. 2001) 22

People v. Bell, 702 N.W.2d 128 (Mich. 2005) 23,25

People v. Boyette, 58 P.3d 391(CA 2002) 24

People v. Daniels, 172 Ill. 2d 154 (1996) 34

People v. Rivera, 879 N.E.2d 876 (Ill. 2007) 23

People v. Webster, 362 Ill. 226 (1935) 34

Reyes v. Greiner, 340 F.Supp. 2d 245 (E.D.N.Y. 2004) 24

Ross v. Oklahoma, 487 U.S. 81 (1988) 15

State v. Logan, 535 N.W.2d 320 (Minn. 1995) 23

State v. Reiners, 664 N.W.2d 826 (Minn. 2003) 23

State v. Vreen, 26 P.3d 236 (Wash. 2001) 19

Stilson v. United States, 250 U.S. 583 (1919) 16

Sullivan v. Louisiana, 508 U.S. 275 (1993) 32

Swain v. Alabama, 380 U.S. 202 (1965) 13,20

Taylor v. Louisiana, 419 U.S. 522 (1975) 24

Tumey v. Ohio, 273 U.S. 510 (1927) 31

United States v. Martinez-Salazar, 528 U.S. 304 (2000) ..... *passim*

United States v. Wood, 299 U.S. 123 (1936) 16

United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) 21

United States v. Blanding, 250 F.3d 858 (4th Cir. 2001) 22

United States v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006) 32

United States v. McFerron, 163 F.3d 952 (6th Cir. 1998) 21

United States v. Patterson, 215 F.3d 776 (7th Cir. 2000)(vacated in part on other grounds, 531 U.S. 1033 (2000)) 20,34

Vasquez v. Hillery, 474 U.S. 254 (1986) 31

Vega v. Portuondo, 120 Fed. Appx. 380 (2d Cir. 2005) 24

Wainwright v. Sykes, 433 U.S. 72 (1977) 17

Waller v. Georgia, 467 U.S. 39 (1984) 31

Statutes and Rules:

725 ILCS 5/115-4(e) 15,18

Ill. S. Ct. R. 434(d) 15,18

BRIEF IN OPPOSITION

Respondent, the State of Illinois, respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the Supreme Court of Illinois, which affirmed petitioner's judgment of conviction for first degree murder.

STATEMENT OF THE CASE

Petitioner, Michael Rivera, was charged with two counts of first-degree murder. (C.L. 9-10) After a jury trial, petitioner was convicted of first-degree murder and was sentenced to 85 years in the Illinois Department of Corrections. (R. D145, J26) Petitioner appealed his conviction and sentence to the Illinois Appellate Court, First District, claiming, among other things, that the trial court committed reversible error in raising a reverse-Batson challenge sua sponte, and then refusing petitioner the use of a peremptory challenge against a certain juror. The appellate court held that the trial court had the right to raise the Batson issue sua sponte and that the trial court's finding of purposeful discrimination in petitioner's use of a peremptory challenge was not "manifestly erroneous." People v. Rivera, 348 Ill. App. 3d 168, 179 (1st Dist. 2004). Petitioner filed a Petition for Leave to Appeal to the Illinois Supreme Court, and that court remanded the matter for a limited hearing "to allow the trial judge an opportunity to articulate the bases for his Batson rulings." People v. Rivera, 221 Ill. 2d 481, 515-16 (2006). Following this limited hearing, the Illinois Supreme Court found that the trial court erroneously determined that a prima facie case of gender discrimination had been

established but that such error was not structural and was harmless beyond a reasonable doubt given the overwhelming evidence of petitioner's guilt.

As the trial record reveals, each party was given seven peremptory challenges against prospective jurors. (R. A3) During voir dire of the first panel, petitioner exercised a peremptory challenge against Elizabeth Alexander, and the court excused her without comment. (R.A73) Voir dire of the first panel resulted in seating Jo Ellen Ek, Cathleen McKendrick, Elizabeth Cheswick and Marianne Vock. (R.A83-84)

Voir dire of the second panel resulted in the seating of Thomas Coyle, Myra Elms-Starks, Jacqueline Garza and Alyssa Maffia-Kupka. (R.A155) The court excused certain veniremembers for cause, including Evangelina Guzman. (R.A102, R.A158-59, A.120, A142, A147) Petitioner objected to the release of Guzman, who did not comprehend much English. (R.A146) Petitioner exercised peremptory challenges against Rosalee Huizenga and Thomas Hickey. (R.A128, A1389) After the People exercised their only peremptory challenge against Teresa Charo, petitioner sought to make a record based on that prospective juror being Hispanic as was petitioner. While petitioner did not raise a Batson challenge, the court nonetheless found no prima facie case existed and noted that it was aware that the petitioner had challenged Ms. Alexander, but stated that the People had not made a "reverse-Batson" motion as to that challenge. (R.A110)

Voir dire of the third panel resulted in the seating of Deloris Gomez, Robert Bollacker, A.J. Rao and Norma Gonzalez. (R.A227)) As the record shows, Ms. Gomez stated during voir dire that she had lived at her present address with her family for 26 years, had been employed for 22 years working at the business office of the Cook County

Hospital, and was now a supervisor there. (R.A168-69) She had two adult children, both of whom worked. She had been a juror a few years earlier in a civil case. (R.A169) She stated that nothing about her prior experience would affect her ability to be fair and she did not know any of the litigants or lawyers in the case. (R.A170) No member of her family had been a victim of crime, nor was she associated with law enforcement. She never had a member of her family or close friend who had been arrested or who had been associated with a criminal case as either a victim or witness. (R.A171) She indicated that neither gun nor gang evidence would prevent her from being fair. (R.A172) She read newspapers in her leisure time and could think of nothing that would prevent her from being fair to both sides if she sat as a juror. (R.A172)

Defense counsel asked Ms. Gomez ten additional questions, including whether she had any contact with patients at the hospital. (R. A207) She stated that as part of her job as a supervisor of the clerical staff, she had contact with the patients as they checked in. (A207) She told defense counsel that being an employee of the out-patient clinic would not "set [her] off one way or another against [petitioner]." (R.A208)

Defense counsel then attempted to use a peremptory challenge against Ms. Gomez, but the trial court asked Ms. Gomez to remain in her seat and called the parties to chambers. (R. A210) The court asked defense counsel, sua sponte, to "articulate a basis" for his use of a peremptory challenge against Ms. Gomez. (R. A210) Defense counsel explained that Ms. Gomez had a "connection to a hospital that on a daily basis probably sees more gunshot victims than any other hospital in the world probably....(and that) even though she's not a rehabilitive (sic) nurse, she on a daily basis sees those

victims who are victims of violent crimes." (R. A211) Defense counsel explained that he was "constrained" and that he was "pulled in two different ways[]" in using a peremptory challenge against Ms. Gomez because of her Hispanic name, however, she saw victims of violent crimes on a daily basis. (R.A211) The court then noted that Ms. Gomez "appears to be an African-American female." (R.A211) When asked by the trial court to give his position on the matter, the prosecutor stated that this was not a case of the victim laying in the street for two hours and that the victim's treatment was not an issue in the case. (R. A211) Thus, the prosecutor asserted that defense counsel provided an insufficient reason for excusing Ms. Gomez. (R.A211)

Defense counsel countered that he had already accepted a black female juror, but the court noted that it was "quite frankly very much concerned" because juror Gomez was the second African-American female that defense counsel had sought to exclude. (R.A212-13) The trial court further stated that Ms. Gomez worked in a clinical division of the hospital, that "she works in a business office[,]" and was concerned about petitioner's use of a peremptory challenge against her. (R. A212) The trial court then asked for any comments from the People, and the prosecutor requested that Ms. Gomez be impaneled as a juror. (R. A213) The trial court commented that it:

> "was concerned about the right of Ms. Gomez to be a juror and participate.
>
> If the State in fact had done this, I certainly would have found they would have established a prima facie case by the very reason – what I'm going to do is allow Ms.

> Gomez – allow her to be seated, not excuse her on the basis of your peremptory.
>
> I feel under these circumstances the reasons given by you, [defense counsel], do not satisfy this Court. As far as I'm concerned, it's more than a prima facie case of discrimination against Ms. Gomez. I'm not going to allow her to be excused. She will be seated as a juror over objection." (R. A213)

Defense counsel then sought to question Ms. Gomez further, the court agreed, and brought Ms. Gomez back into chambers. (R. A213-14) Although defense counsel acknowledged that the victim in this case was not treated at Cook County Hospital, he, again, asked Ms. Gomez whether she would have any prejudice as a result of the gun violence in the case. (R. A215) Specifically, he stated, "does the fact that you see this on a daily basis, unfortunate, innocent victims of gun violence, is that going to cause you to have any degree, any degree, of prejudgments or prejudices against my client because he's accused of causing [sic] another victim of a violent crime[.]" (R. A215) Ms. Gomez clarified that she worked in an out-patient section of Cook County Hospital, "the clinical part," the orthopedic section of the clinic. (R. A215) She specifically told him that she was "not where gun – the shot wounds and things come in which is the medical ER, [she was] in the out-patient clinic." (R. A215) In her clinic, there were mainly appointments and people picking up medications. (R.A215-16) Thus, in response to defense counsel's question as to whether she would be prejudiced against petitioner because some of the

patients picking up medications could have been victims of gun violence, she responded, "No, it does not. It does not affect me in that way." (R. A216) She reiterated that she would be able to fairly view the evidence and follow the instructions on the law. (R.A217)

After Ms. Gomez was excused from the room, the trial court noted that he had just given defense counsel "additional leeway to make an inquiry of this juror" and asked defense counsel if he wished to say anything further. (R. 217-18) Defense counsel responded that he felt the same way and that he was "trying to modify the composition of this panel," indicating that he still wished to excuse juror Gomez, not because of her race, but because he "could also factor in the fact that . . . the jury is predominantly women, I'm trying to also get some impact from possibly other men in the case." (R.A218)

After listening to defense counsel's comments, and after asking the prosecution if it had any further comments, the trial court stated that it

> "...had the opportunity to question Deloris Gomez who I find is a very intelligent lady. I considered her statements very carefully, her testimony very carefully, and I again feel that she shall sit as a juror. I shall not excuse her, and I will override your preemptory (sic) challenge as to Ms. Gomez, and I find no basis for cause. So Ms. Gomez shall sit as a juror." (R. A219)

As to the evidence presented at trial, the Illinois Supreme Court found that the

following facts supported petitioner's guilty verdict:

> Susan Shelton testified that she was with the defendant on the night of the murder. That evening, Shelton attended a party where defendant and several other members of the Insane Deuces were also in attendance. At some point in the evening, defendant, Shelton, Carlos Sanchez (also a gang member), and three others left the party in Sanchez's van, with Sanchez driving. While they were driving around defendant saw two persons walking down the street. Defendant identified those individuals as members of a rival gang. Defendant directed Sanchez to stop the van. Defendant then produced a gun and exited the van, but returned a few seconds later, instructing Sanchez to chase the two persons they had just seen. Shelton testified that they never saw those two individuals again that night, but defendant later noticed another individual on the street, and announced, "There go [*sic*] that pussy ass Stone from earlier." Shelton knew that the Insane Deuces and the Stones were rival gangs.
>
> Defendant pointed his gun at Sanchez and ordered him to "stop the fucking van." When the van stopped, defendant exited the van, still holding the gun. Two other

occupants followed. Defendant ran around the side of the van, and out of Shelton's sight. Shelton then heard gunshots. Defendant and the others returned to the van, with defendant still holding the gun. The two other individuals with defendant were yelling gang slogans until defendant told them to "shut the fuck up," advising them that he still had "one bullet left." Defendant was the only person Shelton saw armed with a weapon that evening. After the shooting, defendant continued to direct the van's movements. At one point, defendant ordered Sanchez to stop in an alley. Defendant unloaded the gun and handed the shell casings to Shelton. Defendant got out of the van with the gun and later returned without it. Shelton gave the shell casings to Sanchez, and he apparently disposed of them. Sanchez then took defendant and three other individuals back to the party. Shelton testified that she believed defendant to be the "chief enforcer" of the Insane Deuces, a gang position below the chief, or "jefe," and above the foot soldiers.

Miguel Rodriguez testified that he was a member of the Insane Deuces on January 9, 1998, and several members of the gang--including defendant--were at his

home that evening. Between 8:30 and 9 p.m. that night, the group was notified that there were some "Stones" in a park near Rodriguez's home. The group, including defendant and a person named "Nelson," went to the park, where they saw some individuals playing basketball. Defendant began to "throw" gang signs, indicating his allegiance to the gang. When those playing basketball did not respond, the group returned to Rodriguez's home. Back at Rodriguez's home, defendant referred to the individuals in the park as "pussies" because they were afraid to fight. Later that night, Rodriguez observed defendant in possession of two chrome revolvers. Thereafter, defendant began asking other gang members if they wanted to go with him to the projects. Defendant and other members of the gang left Rodriguez's home between 12:30 and 1 a.m. When Rodriguez next saw defendant it was approximately 3 a.m. At that time, defendant announced to Rodriguez that he was a "Stone killer," and he indicated he had shot someone that evening. Rodriguez identified Nelson as a "chief" of the gang, and defendant as the "chief enforcer." He explained that the role of the chief enforcer was to enforce the chief's decisions.

Charles Oberlin testified that he was a member of the Insane Deuces in January of 1998, and he knew defendant as the "chief enforcer" of that gang. Around 3 or 4 a.m. on January 10, 1998, Oberlin saw defendant in possession of a chrome gun, and defendant indicated that he had fired the weapon. Oberlin described his own position in the gang hierarchy at the time as that of an "old-G," or elder. Oberlin explained that his position was above that of "foot soldiers," but below the chief enforcers, the chief and the vice-president.

After the State rested, defendant proceeded by stipulation. It was stipulated that on January 15, 1998, Oberlin had testified before the grand jury that the last time he saw defendant with a gun was at a laundromat on Belmont on January 8, 1998. Further, it was stipulated that Rodriguez had testified before the grand jury that he did not see an individual named Masina give defendant the handguns, but only saw defendant with the handguns. Further, it was stipulated that Rodriquez gave grand jury testimony indicating that when defendant was explaining how he shot the victim, defendant stated that the victim grabbed his chest, screamed, fell, and never got back up.

> Finally, it was stipulated that Susan Shelton had testified before the grand jury on January 12, 1998. Shelton testified that, when she was in the van on the evening in question, she heard a gunshot and she then put her head down and closed her eyes, whereafter she heard four more gunshots.
>
> The defense rested without presenting any witnesses.
>
> People v. Rivera, 227 Ill. 2d. 1, 25 (2007).

The jury found petitioner guilty of first-degree murder. Petitioner was sentenced to eighty-five years in the Illinois Department of Corrections.

On appeal to the Illinois Supreme Court, petitioner argued error with regard to jury selection during trial (reverse-Batson), and the state high court determined that the prima facie question was not moot because the defense was denied its right to exercise a peremptory challenge against Ms. Gomez. People v. Rivera, 221 Ill. 2d 481, 515-516 (2006). That court explained that before a trial court may raise a Batson claim sua sponte, there must be a "clear" indication of a prima facie case and the trial court "must make an adequate record, consisting of all relevant facts, factual findings, and articulated legal bases for both its finding of a prima facie case and for its ultimate determination at the third stage of the Batson procedure." Id. at 515-16. The state high court then remanded for a limited hearing, stating that the trial court had failed to "see to it that adequate facts are preserved in the record to support its ruling," and directed the trial court to make an adequate record for its finding of a prima facie case and for its ultimate determination at

the third-stage of the hearing. Id. at 516.

During the limited remand hearing, the trial court explained that although defense counsel raised Ms. Gomez's employment and the exposure "she may have had" to victims of violence as the reason for his peremptory challenge, that Ms. Gomez testified that she was employed as a supervisor in a building separate and apart from Cook County Hospital and that she could be "fair and impartial and would follow the instructions on the law by this court." (Supp. R 4) The trial court further commented that it had given defense counsel an additional opportunity to question Ms. Gomez but that the additional questioning "did not establish any neutral basis as to why she should be withdrawn." (Supp. R 4) The trial court further noted that because a "majority of the jury consisted of women," it believed that petitioner

> "was seeking to excuse Ms. Gomez because she in fact was a woman. That he wanted input he said for the record for (sic) male jurors. The women comprised a majority of the jury selected and that he attempted to 'balance' the jury by trying to get more men on the jury." (Supp. R 4)

Based on defense counsel's remarks and the nature of his questioning of Ms. Gomez, the trial court believed that a prima facie case of gender discrimination had been established. (Supp. R 4) He then immediately proceeded to stages 2 and 3 of the Batson process as "[t]here was no reason to have any delay." (Supp. R 5) Upon examining the "totality" of the circumstances, the trial court found no basis to exclude Ms. Gomez, and

> "it appeared very obviously [sic] to me by observing

> counsel and considering his admission as to why he wants to excuse women as jurors, I felt that her 14th Amendment right to be a juror would in fact be violated if she was so excused." (Supp. R 6)

The Illinois Supreme Court held that the trial court erred when it found that a prima facie case of gender discrimination had been established, but that any error was harmless beyond a reasonable doubt given the overwhelming evidence of petitioner's guilt. People v. Rivera, 227 Ill. 2d 1, 26 (2007). The state high court specifically relied upon United States v. Martinez-Salazar, 528 U.S. 304 (2000), as clarifying that the erroneous denial or impairment of the right to exercise a peremptory challenge no longer requires automatic reversal, as stated as dictum in Swain v. Alabama, 380 U.S. 202, 219 (1965), in the age of "harmless-error review." Rivera, 227 Ill. 2d at 19. It determined that the erroneous denial of a peremptory challenge does not qualify as structural error, as it has never been included in the recognized, short list of structural errors as determined by this Court, then found that any error was harmless beyond a reasonable doubt upon reviewing the evidence presented against petitioner at trial and determining that no rational jury - or juror - would have acquitted petitioner of the offense given the overwhelming evidence of petitioner's guilt. Id. at 26.

REASONS FOR DENYING THE PETITION

Petitioner's primary argument for certiorari is that the issue presented directly implicates a 7-2 split, and indirectly implicates a 19-12 split in cases involving the denial of for-cause challenges. (Pet. at 4-5). This Court should deny certiorari for three reasons. First, because it lacks subject-matter jurisdiction: peremptory challenges are a state statutory right, not a right afforded by the Federal Constitution. Thus, each state is free to choose to apply harmless error analysis in these types of cases.

Second, certiorari should be denied because the alleged splits are either illusory or not implicated by the case at bar. The alleged 7-2 split is manufactured. In fact, just one early outlier court has disagreed with Illinois's approach, but a number of courts have taken a consistent approach. The 19-12 split that petitioner identifies arises from trial court error in denying a for-cause challenge to seating a juror, but, as discussed below, that is not present here, and therefore this case is a poor vehicle to resolve that split. Finally, the Illinois Supreme Court's decision was correct on the merits.

I.

THIS COURT LACKS JURISDICTION WHERE NO FEDERAL QUESTION HAS BEEN PRESENTED SINCE THE PETITIONER'S RIGHT TO PEREMPTORY CHALLENGES IS A STATE STATUTORY RIGHT AND DOES NOT IMPAIR THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY.

As this Court has made very clear, peremptory challenges are not of constitutional dimension but are, rather, matters of State law, meaning that a State may determine their number, their purpose, and the manner of their exercise. Ross v. Oklahoma, 487 U.S. 81 (1988).[1] The loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. Ross, 487 U.S. at 88. Rather, peremptory challenges are a means to achieve the end of an impartial jury. Id. This is distinct from a Batson error that occurs when a juror is actually dismissed on the basis of race or gender; it is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal. See Johnson v. United States, 520 U.S. 461, 468-469 (1997); J. E. B. v. Alabama ex rel T. B., 511 U.S. 127, 142 (1994). But the denial of a peremptory challenge on other grounds amounts to the denial of a state statutory or court-rule-based right to exclude a certain number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension. United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000); Ross, 487 U.S. at 88 (1988).

Neither the Sixth Amendment right to an impartial jury, nor the right to due

---

[1] Illinois permits peremptory challenges in non-capital criminal cases. See Ill. S. Ct. R. 434(d); 725 ILCS 5/115-4(e).

process of law guaranteed under the Fourteenth Amendment was infringed here where this Court has repeatedly stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial. See Frazier v. United States, 335 U.S. 497, 505 n. 11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936); Stilson v. United States, 250 U.S. 583, 586 (1919) and Georgia v. McCollum, 505 U.S. 42, 57 (1992)(because peremptory challenges are "state created means to the constitutional end of an impartial jury and fair trial . . . the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial"). Moreover, a defendant's due process rights regarding peremptory challenges are not denied or impaired if the defendant receives that which state law provides. Ross, 487 U.S. at 89. State law provides for the free exercise of peremptory challenges constitutionally constrained only by equal protection concerns as defined in Batson and its progeny. The only constitutional limitation on the statutory right of a peremptory challenge is the prohibition from exercising peremptory challenges on the basis of gender, ethnic origin, or race, which is violative of the Equal Protection Clause. See Martinez-Salazar, 528 U.S. at 315, citing J.E.B, 511 U.S. at 142 (gender); Hernandez v. New York, 500 U.S. 352 (1991)(ethnic origin); and Batson v. Kentucky, 476 U.S. 79 (1986)(race).

Thus, as the foregoing demonstrates, Batson, and its progeny, are clearly founded on the premise that discrimination in jury selection is an independent wrong that must have its own redress. Thus, this Court has explained:

> Discrimination in jury selection, whether based on race or

> on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders. J.E.B., 511 U.S. at 140 (internal citation omitted).

Where a defendant is disallowed a peremptory challenge, by contrast, none of the harms implicated by Batson are at issue because no discrimination has occurred. This should be the same even if the disallowance was based on a trial court's incorrect assessment of whether a prima facie case was established or a defense counsel's reasoning for exercising the peremptory challenge. The only harm is that the litigant has been mistakenly deprived of a peremptory challenge; a state-created trial tool.

This Honorable Court has continually stated that when a state court has decided a question on independent and adequate state grounds, the Court lacks jurisdiction to review that decision on Certiorari. Wainwright v. Sykes, 433 U.S. 72 (1977). As this Court noted in Henry v. Mississippi:

> It is, of course, a familiar principle that this Court will

> decline to review state court judgments which rest on adequate and independent state grounds, even when those judgments also decide federal questions. The principle applies not only to cases involving state substantive grounds, but also to cases involving state procedural grounds. Henry, 397 U.S. 433, 436 (1965).

In the instant case, the Illinois Supreme Court was reviewing the denial of peremptory challenges available purely as a matter of Illinois law. 725 ILCS 5/115-4(e); see also Ill. S. Ct. R. 434(d). Because there is no federal constitutional right to a peremptory challenge, this Court should decline to review the Illinois Supreme Court's denial of a defendant's statutory right to exercise a peremptory challenge. Although petitioner argues that "this case provides precisely the vehicle that this Court has been lacking: A specific juror was seated at petitioner's trial who, were it not for the misapplication of the reverse-Batson rule that deprived petitioner of the use of his peremptory challenge, would have been dismissed," (Pet. at 16), this statement is precisely why this Court should **not** grant the petition where petitioner readily admits that this matter merely involves the loss of the use of a peremptory challenge which is not a constitutional violation and cannot result in petitioner receiving relief in the form of a new trial.

II.

PETITIONER'S ALLEGED 7-2 SPLIT ON THE ISSUE PRESENTED BY THIS CASE IS NOT AS DESCRIBED – ABSENT ONE EARLY OUTLIER, COURTS HAVE AGREED WITH THE ILLINOIS SUPREME COURT THAT HARMLESS ERROR APPLIES TO THE IMPROPER DENIAL OF A PEREMPTORY CHALLENGE

Jurisdiction aside, the precise issue presented by the Illinois Supreme Court's decision below is whether harmless error analysis may apply to a trial court's improper denial of a defendant's peremptory challenge. (Pet. App. 11a; Pet 3) Here, the Supreme Court of Illinois held that harmless error analysis was proper given this Court's decision in United States v. Martinez-Salazar, 528 U.S. 304, 317 n.4 (2000). (Pet. App. 12a) As petitioner notes, the Supreme Court of Washington disagreed, in State v. Vreen, 26 P.3d 236, 240 (Wash. 2001), however, the remaining cases cited by petitioner do not directly conflict with Rivera, as discussed below. Moreover, a number of courts that petitioner fails to cite also agree with Rivera. In sum, Vreen was an outlier decision, rendered shortly after Martinez-Salazar was decided, and subsequent decisions from a number of courts agree with Rivera.

A.

Cases Decided Before Martinez-Salazar Do Not Conflict With Rivera.

Clearly ignoring this Court's pronouncement in Martinez-Salazar, 528 U.S. 304, 317 n. 4 (2000), petitioner claims that the rulings from other jurisdictions have caused a "mature and deep split of authority" that this Court must resolve. (Pet. at 3) But petitioner's attempt to create a split is illusory where petitioner lumps all lower court

decisions together, regardless of when they were decided, without acknowledging that cases decided before Martinez-Salazar do not conflict with the Illinois Supreme Court's decision in Rivera.

Swain v. Alabama, 380 U.S. 202, 219 (1965), noted the importance of a defendant's right to exercise peremptory challenges and stated, in dictum, that an improper denial of a peremptory challenge is "reversible error without a showing of prejudice." But United States v. Martinez-Salazar, 528 U.S. 304, 317 n. 4 (2000), subsequently clarified that "the oft-quoted language in Swain was not only unnecessary to the decision in that case -- because Swain did not address any claim that a defendant had been denied a peremptory challenge -- but was founded on a series of our early cases decided long before the adoption of harmless-error review." It further held that a "defendant's exercise of peremptory challenges ... is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause." Id. at 317. Thus, because Martinez-Salazar clarified that the dictum in Swain was fundamentally flawed, lower court cases decided before Martinez-Salazar are inapposite.[2]

---

[2] See, also, United States v. Patterson, 215 F.3d 776, 781-782 (7th Cir. 2000)(vacated in part on other grounds, 531 U.S. 1033 (2000)), where this Court's observations in Martinez-Salazar caused the Seventh Circuit to reject the automatic reversal rule involving claims of error arising from the loss or impairment of peremptory challenges. ("Martinez-Salazar . . . pulls the plug on the Swain dictum and requires us to address the harmless-error question as an original matter"). Id. (citations omitted).

Despite this Court's clear pronouncement in the operative footnote in Martinez-Salazar, petitioner attempts to create a "split of authority" by citing to seven cases which he believes required automatic reversal following an erroneous ruling in a reverse-Batson matter; his attempt to do so is misguided and simply wrong. In United States v. McFerron, 163 F.3d 952 (6th Cir. 1998), the government objected when the defendant used seven of her ten peremptory challenges on white males. The Sixth Circuit held that the district court erred by not conducting a Batson third-step analysis. Id. at 955. McFerron rejected the government's argument that this was harmless error, holding that "[t]his type of error involves a `structural error,' which is not subject to harmless error analysis." Id. at 955-56.

McFerron in turn relied upon United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996)(en banc). Annigoni included a full discussion of whether harmless error analysis applied to the erroneous denial of a right to a peremptory challenge. Id. at 1142-43. In holding harmless error inapplicable, the court relied explicitly on this Court's dictum in Swain that such error is reversible without the need to show prejudice. Id. at 1143. Because Annigoni and McFerron were decided before Martinez-Salazar, they simply cannot be said to conflict with the Illinois Supreme Court's decision here, which, as petitioner concedes, relied expressly on Martinez-Salazar. (Pet. at 11). Annigoni, and, by extension, McFerron, relied on Swain, which this Court rejected in Martinez-Salazar. Accordingly, these two cases should not be included in petitioner's alleged split.

B.

Cases That Fail To Discuss Harmless Error Do Not Conflict With The Instant Illinois Supreme Court Decision.

Three of petitioner's authorities are of little relevance because the courts in those cases simply reversed the erroneous denial of a peremptory challenge without considering whether harmless error should apply. In United States v. Blanding, 250 F.3d 858 (4th Cir. 2001), the court found that the district court erred by denying a peremptory challenge that resulted in the seating of a possibly biased juror whose vehicle bore a bumper sticker of the confederate flag. The court did not discuss whether this error could be harmless or whether it was structural error. Indeed, the government did not even argue that it was harmless error. Thus, this issue was neither presented nor decided.

Similarly, the courts in Holder v. State, 124 S.W.3d 439 (Ark. 2003) and Parker v. State, 778 A.2d 1096 (Md. 2001), overturned the convictions without discussion of whether harmless error should apply. Both courts simply concluded that the trial court had erred and, in a sentence without citation, stated that the defendant should be given a new trial. Holder, 124 S.W.3d at 453; Parker, 778 A.2d at 1002. Thus, as with Blanding, these cases are not in conflict with Rivera.

C.

Cases That Fail To Discuss Martinez-Salazar Do Not Conflict With The Instant Illinois Supreme Court Decision.

Petitioner also relies on Angus v. State, 695 N.W.2d 109 (Minn. 2005), as

forming part of the split. While Angus held that the error was structural, and not amenable to harmless error review, it did so in an abbreviated discussion relying on Minnesota case law rooted in Annigoni and other pre-Martinez-Salazar decisions. Angus, 695 N.W.2d at 118 (citing State v. Reiners, 664 N.W.2d 826, 835 (Minn. 2003); State v. Logan, 535 N.W.2d 320, 324 (Minn. 1995)). In sum, Minnesota courts have continued to apply the Swain rule as a matter of state law without discussing, much less deciding, whether Martinez-Salazar changes their analysis.

D.

Cases That Agree With The Instant Illinois Supreme Court Decision.

Petitioner incorrectly asserts that only one court agrees with the instant Illinois Supreme Court decision: People v. Bell, 702 N.W.2d 128 (Mich. 2005). Not only have the state high courts in Illinois and Michigan embraced this Court's clear pronouncement that the loss of the use of a peremptory challenge is no longer grounds for automatic reversal, but other courts, despite petitioner's belief that there are only two, have embraced such notion as well. The Pennsylvania state high court, in Commonwealth v. Carson, 741 A.2d 686 (Pa. 1999), found that no prejudice resulted from seating a juror who the defendant attempted to have removed by use of a peremptory challenge. Id. at 696. Although the defendant argued that the trial court's seating of the juror infringed on his "right to select those people who he believed would grant him a fair trial," the Pennsylvania Supreme Court held that the Sixth Amendment guarantees the right of the criminal defendant to a "jury pool drawn from a fair cross section of the community but did not guarantee a criminal defendant the jury of his choice or of any particular

composition." Id. at 696. Because the defendant had failed to make a showing that the particular juror was biased or incompetent to serve as a juror, he was entitled to no relief. Id.

Numerous courts across the country have also rejected an automatic reversal rule. People v. Boyette, 58 P.3d 391(CA 2002) (in a reverse-Batson case, the reviewing court assessed the trial court's denial of the defendant's use of a peremptory challenge by determining whether the evidence presented at trial was so overwhelming that any resulting error was harmless); Frazier v. New York, 156 Fed.Appx. 423, 425 (2nd Cir. 2005)("[t]here is no Supreme Court precedent clearly establishing that the success of a prosecutor's Batson challenge works any constitutional harm in the absence of any showing that the seated juror was biased."); and Vega v. Portuondo, 120 Fed. Appx. 380, 383 (2d Cir. 2005) (federal habeas court could not hold that state trial court's refusal of defense peremptory challenge denied petitioner a constitutional right, given that this Court has declined to recognize a constitutional right to exercise peremptory challenge). Other federal habeas courts have similarly decided various matters dealing with a defendant's loss of the use of a peremptory challenge. See, Long v. Norris, 2007 U.S. Dist. LEXIS 49883 (E.D. Ark. July 10, 2007) ("the mere fact that the trial court disallowed petitioner two of his peremptory challenges to white males does not violate the Constitution[]"), Reyes v. Greiner, 340 F.Supp. 2d 245, 275 (E.D.N.Y. 2004)(where the court stated, in dictum, that reverse-Batson errors "do not even implicate the Equal Protection Clause."); and Haywood v. Portuando, 288 F.Supp. 2d 446, 461-62 (S.D.N.Y. 2003) (trial court's alleged error in denying the defendant the use of a

peremptory challenge was not an "egregious departure" from accepted standards of legal justice and, thus, did not result in the deprivation of due process).

Thus, the foregoing citations clearly prove that, following this Court's pronouncement in Martinez-Salazar, wherein this Court overruled Swain's dictum, there is no obvious split of authority but merely certain courts which have failed to properly analyze the issue. Regardless, if any "split of authority" exists with regard to a defendant's loss of the use of a peremptory challenge during voir dire, such "split" leans toward the reasoning as pronounced by this Court in Martinez-Salazar and properly utilized by the Illinois Supreme Court in its opinion below.

E.

In Sum, The Alleged Split Is Illusory.

A thorough review of the relevant cases, including several not cited by petitioner, reveals that the legal landscape is much different than the one described in the petition. Instead of a 7-2 split, with a majority of courts in direct conflict with the Illinois Supreme Court's decision, the opposite is true. In reality, only the Washington court, in Vreen, contains an analysis that directly conflicts with the Illinois Supreme Court's decision here. And as the Michigan court noted, Vreen is unpersuasive because its analysis was cursory and failed to recognize that Martinez-Salazar constituted a "significant shift" regarding the outcome of the erroneous denial of a peremptory challenge. Bell, 702 N.W.2d at 139 n. 18. In any event, Vreen was an early outlier, and certiorari need not be used to correct the Washington court's error that the Washington courts, themselves, are likely to remedy.

III.

THIS CASE IS A POOR VEHICLE FOR DECIDING THE ALLEGED SPLIT BECAUSE IT REQUIRES RESOLUTION OF WHETHER A PRIMA FACIE CASE WAS ESTABLISHED AT TRIAL.

Even if this Court were determined to correct the error in Vreen, this case is a poor vehicle for doing so because it requires resolution of an outstanding question whether a prima facie case was established at trial. Although the Illinois Supreme Court determined, following the Batson remand hearing, that the trial court had erroneously ruled that a prima facie case of gender discrimination had been established, the People disagree with the state high court's assessment. If certiorari were granted, this threshold issue would be relitigated before this Court.

The trial court correctly believed that petitioner's use of his peremptory challenges raised an inference of purposeful gender discrimination when defense counsel exercised his fourth peremptory challenge to exclude a third female. Given that petitioner's jury already included seven women at the time that defense counsel attempted to use a fourth peremptory challenge against Deloris Gomez, it was precisely the large number of women already impaneled on the jury which led the trial court to raise the Batson issue sua sponte. The court was convinced that petitioner's actions in using a third peremptory challenge against a female had raised the inference of a prima facie case despite the fact that there was a predominant number of women on the jury, where the court stated at the remand hearing,

"I indicated I was raising a Baston (sic) issue because Ms.

> Gomez was in fact the second (sic) woman peremptorily challenged by the Defendant. A majority of the jury consisted of women. And I felt that under these circumstances the Defendant was seeking to excuse Ms. Gomez because she in fact was a woman." (Supp. R at 4)

Thus, the trial court found that petitioner was attempting to exclude Ms. Gomez solely because she was a woman, and petitioner conceded as much. Defense counsel, in no uncertain terms, stated that it was his attempt to "get some impact from * * * men in the case." As this Court has made clear, it is irrelevant whether one woman or ten women sat on the jury; petitioner's exclusion of one woman on the basis of gender was unconstitutional. See, J.E.B., 511 U.S. at 140. Here, the trial court chose not to believe the defense attorney's explanations for striking Deloris Gomez and rightfully rejected his explanations, especially where one of the explanations was clearly discriminatory on its face. Yet, the state high court improperly failed to defer to the trial court's finding which turned on the evaluation of defense counsel's credibility. Batson, 476 U.S. at 98, n.21.

The state high court also erred when it held that the prima facie question was a moot point. The law from this Court is unquestionably clear: "Once a [party] has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [objector] had made a prima facie showing becomes moot." Hernandez, 500 U.S. at 359. In Hernandez, this Court, in reviewing a ruling on a defendant's Batson motion, held that the preliminary issue of whether the defendant has made a prima facie case becomes

moot where the trial court fails to determine whether such a showing has been made, the State voluntarily offers reasons for its challenges, and the trial court rules on the ultimate question of purposeful discrimination. Id. Here, the trial court determined that a prima facie issue had been established and defense counsel offered his reasons for excusing Deloris Gomez, but the trial court found those reasons discriminatory. Although the Illinois Supreme Court determined that when a party is ultimately denied its right to exercise a peremptory challenge, the "matters bearing upon the first stage of the Batson process is properly within the scope of appellate review and not moot," (Rivera, 221 Ill. 2d at 507), this reasoning conflicts with the prior holdings of this Court. As the law dictates, once the trial court below ruled on the ultimate question of petitioner's gender discrimination, the question of whether a prima facie case had been established became academic. Hernandez, 500 U.S. at 359 (1991).

Certainly, if the Illinois Supreme Court had properly held the prima facie issue to be a moot point, it would have then determined that defense counsel's reasoning for Ms. Gomez's removal was blatanly, and admittedly, gender-based. This, of course, would have resulted in there being no reason to address the "harmless error" argument as defense counsel admitted to his blatant gender discrimination by wanting more "men" on the jury. This Court must address this question before it can reach petitioner's claim. Because this case will necessarily involve a review of the threshold question of whether the trial court erred, this case is a poor vehicle to resolve the question presented. This Court should wait for a case where the propriety of the juror's dismissal under Batson is no longer a live, controverted issue preserved for further review in this Court, or at least

where the trial court's Batson ruling was not so patently correct.

IV.

THIS CASE IS NOT THE PROPER VEHICLE FOR ADDRESSING THE OTHER SPLIT THAT PETITIONER ALLEGES.

Petitioner presents a second "split of authority" argument premised on the situation at issue in United States v. Martinez-Salazar, 528 U.S. 304 (2000), where the defendant alleged that he was forced to use a peremptory challenge following the trial court's erroneous denial of a for-cause challenge. Id. at 309. But the situation implicated in Martinez-Salazar is not at issue here. Moreover, this Court definitively ruled in Martinez-Salazar that a defendant's use of a peremptory challenge in those circumstances did **not** result in a violation of his Fifth Amendment right to due process as he had a choice to make and "[a] hard choice is not the same as no choice." Id. at 317. According to this Court, a defendant who curatively uses a peremptory challenge to remove a particular juror following the trial judge's erroneous denial of a "for-cause" challenge is not deprived of any rule-based or constitutional right because the defendant was not denied the constitutional guarantee of an impartial jury. Id. at 315-317.

Although petitioner attempts to entice this Court to use this case as the vehicle to resolve a hypothetical scenario outlined in Justice Souter's concurrence in Martinez-Salazar (Pet. at 7 and 15), because this case does not involve a similar factual scenario, it is an improper vehicle to resolve that point of law. Justice Souter made clear that Martinez-Salazar:

> ...does not present the issue whether it is reversible error

> to refuse to afford a defendant a peremptory challenge beyond the maximum otherwise allowed, when he has used a peremptory challenge to cure an erroneous denial of a challenge for cause and when he shows that he would otherwise use his full complement of peremptory challenges for the noncurative purposes that are the focus of the peremptory right. Martinez-Salazar did not show that, if he had not used his peremptory challenge curatively, he would have used it peremptorily against another juror. He did not ask for a make-up peremptory or object to any juror who sat. Martinez-Salazar simply made a choice to use his peremptory challenge curatively. Martinez-Salazar, 528 U.S. at 317-318. (Souter, J., concurrence)

Here, unlike either Martinez-Salazar, or the hypothetical presented by Justice Souter, petitioner was allotted seven peremptory challenges, but used only four. Thus, this is neither a denial of a "for-cause challenge" case, nor a situation in which a defendant has used his allotment of challenges and argues that he should have been given an additional challenge "for the noncurative purposes that are the focus of the peremptory right." In fact, petitioner both failed to use his full allotment of peremptory challenges and never sought to strike juror Deloris Gomez for cause. Thus, any alleged split of authority regarding the "for-cause" challenge fact scenario has already been addressed by this Court's clear pronouncement in Martinez-Salazar and need not be re-examined here,

particularly since this case did not involve an erroneous denial of a "for-cause" challenge. A judgment in this case therefore will not resolve the allegedly more mature split that petitioner identifies. Finally, petitioner's contention that the "for cause" issue is commonplace, (Pet. at 15) undermines the need to grant certiorari in a case like this one that fails even to present the issue.

V.

THE SUPREME COURT OF ILLINOIS CORRECTLY HELD THAT HARMLESS ERROR ANALYSIS APPLIES TO "REVERSE-BATSON" ISSUES AND THAT THE LOSS OF THE USE OF A PEREMPTORY CHALLENGE IS NOT A STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL.

In any event, the Illinois Supreme Court's decision below was correct. The Illinois Supreme Court properly held that any error involving petitioner's statutory state right to a peremptory challenge is not a structural error but is subject to harmless error review pursuant to Neder v. United States, 527 U.S. 1, 8 (1999). Neder held that errors requiring automatic reversal, i.e., "structural errors" apply to certain constitutional errors in a "limited class" of cases. Id. at 8 (1999) (stating "limited class" of cases which include Johnson v. United States, 520 U.S. 461, 468 (1997) (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); and Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt

instruction). An additional class was added to this very short list last year. See, United States v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006) (finding that the denial of counsel of choice was not amenable to harmless-error analysis because such error was not quantifiable). Petitioner's claim does not "fit comfortably" within structural error situations (Pet. at 21) outlined by these cases. The denial or impairment of a peremptory challenge has yet to fall under the "limited class of constitutional errors [that] are structural and subject to automatic reversal," Neder, 527 U.S. at 8, and petitioner provides this Court with no rationale to expand the "very limited class" of errors. The error at bar is unlike these errors this Court has defined as structural.

Certainly, despite petitioner's belief to the contrary, any error here did not "infect the entire trial process" or the "framework within which the trial" proceeded. (Pet. at 17) Indeed, although the petitioner consistently argues that Deloris Gomez was an "objectionable" juror, no record evidence demonstrates that Deloris Gomez was biased in any way, or that she precluded petitioner from receiving a fair trial. The fact that petitioner "objected" to Deloris Gomez sitting on the jury does not make her "objectionable." Significantly, defense counsel never sought to remove Ms. Gomez for cause or even claim that she was biased. Although petitioner now argues that one side was given a "greater ability to weed out those elements of the jury pool that it believes may tilt jurors in favor of the other side...," (Pet. at 7), nothing in the record supports this, particularly given that petitioner used four of seven peremptory challenges while the prosecution used only one. What the record establishes is that the trial court prevented the defense attorney from discriminating against a prospective juror on the basis of

gender.

Again, the loss of the use of a peremptory challenge is simply the loss of the use of a statutory right which clearly cannot affect the structural nature of a trial and does not, contrary to petitioner's claim, "transcend the evidence." (Pet. at 19) Here, a prospective juror said she could be fair, the defense attorney used a peremptory challenge but never challenged her for cause, and the trial court believed that gender discrimination was behind the challenge. Clearly, as this record demonstrates, the jury was not "organized to convict," (Pet. at 20) rather, the evidence was the supporting framework behind the conviction and not Ms. Gomez. As the Illinois Supreme Court found, "any rational trier of fact would have found defendant guilty of murder..." Rivera, 879 N.E.2d at 890. The state high court determined that the prosecution presented evidence which proved that petitioner "shot and killed 16-year-old Marcus Lee, erroneously believing that Lee was a member of a rival gang." Id.

Petitioner implies that he had the right not to have Deloris Gomez seated on his jury. But the Sixth Amendment to the United States Constitution, ensuring the right of a criminal defendant to an impartial jury of his peers, guarantees the right of the criminal defendant to a jury pool drawn from a fair cross section of the community, but it does not guarantee a criminal defendant the jury of his choice or of any particular composition. See, Taylor v. Louisiana, 419 U.S. 522, 538 (1975). Again, petitioner has made no showing that Ms. Gomez was biased or incompetent in any way to serve as a juror. The crux of petitioner's argument is that he was denied peace of mind that Ms. Gomez would not only be impartial, but also favorably disposed to his defense. However, as observed

by the Seventh Circuit Court of Appeals, "reduced peace of mind is a bad reason to retry complex cases decided by impartial juries." Patterson, 215 F.3d at 782. Petitioner suffered no prejudice as a result of the trial court seating Ms. Gomez based on the overwhelming evidence of his guilt as determined by the Illinois Supreme Court.

Certainly, the Illinois Supreme Court is keenly aware of its duty to prevent constitutional violations and it has determined, in other situations, that certain defendants have been deserving of relief based on violations which concern the denial of the proper number of peremptory strikes and that court has offered relief where it was required under the law. For instance, in People v. Daniels, 172 Ill. 2d 154 (1996) and People v. Webster, 362 Ill. 226 (1935), the defendants argued that they were denied a fair trial and due process of law because the trial court permitted them only half the peremptory challenges required under law and their requests to use additional challenges were denied. Daniels, 172 Ill. 2d at 158 (defense counsel was permitted to use 7 of 14 challenges); Webster, 362 Ill. at 226 (defense counsel permitted to use 10 of 20 challenges). In both cases, the Illinois Supreme Court held that the defendants were denied due process of law based on the trial court's denial of each defendant's exercise of the correct amount of peremptory challenges. In other words, where the statute or state supreme court rule gave those defendants the right to a certain number of peremptory challenges, the defendants had the right to exercise the full amount of peremptory challenges to which they were entitled. Daniels, 172 Ill. 2d at 166; Webster, 362 Ill. at 228. However, unlike Daniels and Webster, here, there is no claim by petitioner that he was denied the proper **amount** of peremptory challenges – he was merely denied the use of a peremptory

challenge against a particular juror because the trial court reasonably believed it was being used in a discriminatory manner. Thus, the Illinois Supreme Court was permitted, under the prevailing law, to find any resulting error harmless beyond a reasonable doubt. This challenge to the Illinois Supreme Court's decision is unworthy of certiorari review by this Court.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

LISA MADIGAN,
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Attorney for Respondent

RICHARD A. DEVINE,
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
JAMES E. FITZGERALD,
ALAN J. SPELLBERG,*
JUDY L. DeANGELIS,
Assistant State's Attorneys,
Of Counsel

*Attorney of Record

REPLY BRIEF

12C

15

No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITIONER'S REPLY BRIEF

ROBERT N. HOCHMAN
AARON S. MANDEL
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

July 2, 2008

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONER'S REPLY BRIEF	1
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Angus v. *State*, 695 N.W.2d 109 (Minn. 2005) 8
Arizona v. *Fulminante*, 499 U.S. 279 (1991) ... 5
Burks v. *United States*, 437 U.S. 1 (1978) ... 11
Commonwealth v. *Carson*, 741 A.2d 686 (Pa. 1999), *abrogated on other grounds by Commonwealth* v. *Freeman*, 827 A.2d 385 (Pa. 2003) 9
Evitts v. *Lucey*, 469 U.S. 387 (1985) 3
Frazier v. *New York*, 156 F. App'x 423 (2d Cir. 2005) 10
Hernandez v. *New York*, 500 U.S. 352 (1991) 11
Hicks v. *Oklahoma*, 447 U.S. 343 (1980) 3
Holder v. *State*, 124 S.W.3d 439 (Ark. 2003) .. 9
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 3
Neder v. *United States*, 527 U.S. 1 (1999) 5
Parker v. *State*, 778 A.2d 1096 (Md. 2001) .. 9
People v. *Boyette*, 58 P.3d 391 (Cal. 2003) ... 9
People v. *Daniels*, 665 N.E.2d 1221 (Ill. 1996) 5
Ross v. *Oklahoma*, 487 U.S. 81 (1988) 2, 10
State v. *Vreen*, 26 P.3d 236 (Wash. 2001) 1
Swain v. *Alabama*, 380 U.S. 202 (1965), *overruled on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986) 7
United States v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1996) 8
United States v. *Blanding*, 250 F.3d 858 (4th Cir. 2001) 9
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) 5

TABLE OF AUTHORITIES—continued

Page

United States v. *Martinez-Salazar*, 528 U.S. 304 (2000) 2, 6, 8
United States v. *McFerron*, 163 F.3d 952 (6th Cir. 1998) 8
United States v. *Nobles*, 422 U.S. 225 (1975) 3, 11
United States v. *Stewart*, 65 F.3d 918 (11th Cir. 1995) 11
Vega v. *Portuondo*, 120 F. App'x 380 (2d Cir. 2005) 10

STATUTE

28 U.S.C. § 1257 4

RULE

Sup. Ct. R. 12.5 ..... 3, 10

IN THE

Supreme Court of the United States

No. 07-9995

MICHAEL RIVERA

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITIONER'S REPLY BRIEF

Respondent cannot and does not dispute that the petition presents a question over which a split of authority exists. Opp'n 19, 25 (conceding that *State* v. *Vreen*, 26 P.3d 236, 240 (Wash. 2001) (en banc), "directly conflicts" with decision under review). Its effort to minimize the split of authority depends on its failure to grasp the nature of the error that impacted petitioner's trial. Petitioner is not claiming that he was denied some *number* of peremptory challenges he was entitled under state law. Opp'n 30-31 (arguing that, because petitioner did not use full allotment of peremptory challenges, review here would not "resolve the allegedly more mature split that petitioner identifies"). Petitioner's claim, like all the cases discussed in the petition, see Pet. 3-6, is that the trial court's erroneous ruling resulted in the seating of a juror who petitioner had the right to

exclude. As in the cases making up the broad split of authority, here the erroneous denial of a peremptory challenge actually had an effect on the composition of the jury. As Justice Souter observed in *United States* v. *Martinez-Salazar*, 528 U.S. 304, 317-18 (2000) (Souter, J., concurring), the question whether harmless-error analysis or automatic reversal applies when that happens has never been decided by this Court. This case provides an ideal opportunity to do so.

Respondent's mischaracterization of the issue also underlays its principal argument for denying the petition: its view that the error did not violate any federal constitutional right. Opp'n 15-18. Contrary to respondent's suggestion, Opp'n 16, petitioner does not claim that the Constitution requires that he be given the right to exercise peremptory challenges. However, as this Court has observed, peremptory challenges play a significant role in "achiev[ing] the end of an impartial jury." *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988). Petitioner contends that, *if* a state grants the parties the right to exercise peremptory challenges, the erroneous denial of that right violates petitioner's constitutional rights to due process and an impartial jury when it results in the seating of a juror who should have been excused. Pet. 19-20, 23-24 (citing cases). This Court has jurisdiction to review the Illinois Supreme Court's ruling.

Respondent lastly suggests that this Court cannot reach the question presented—whether automatic reversal or harmless error analysis should apply—without first deciding whether the trial court's reverse-*Batson* ruling was, in fact, erroneous. This is simply wrong. Respondent makes no effort to explain why the Illinois Supreme Court's application of settled law on the reverse-*Batson* issue is worthy of

this Court's review. It is not, which explains why respondent did not file a conditional cross-petition for certiorari on the question. See Sup. Ct. R. 12.5. Thus, review of that ruling would at best be a matter of this Court's discretion. *United States* v. *Nobles*, 422 U.S. 225, 241-42 n.16 (1975). And there is no reason here to undertake review of such a fact-bound question.

In sum, respondent's efforts to distract from the admitted split of authority warranting this Court's review fail. The petition presents an ideal vehicle for reviewing a mature split of authority over an issue that members of this Court have acknowledged remains unanswered. The petition should be granted.

1. Respondent claims that petitioner has not asserted the violation of a federal constitutional right. Opp'n 15-18. Respondent is wrong.

Respondent emphasizes this Court's decisions holding that the constitution does not require states to grant litigants the right to peremptorily challenge jurors. Opp'n 16. But here the state did grant the litigants the right to exercise peremptory challenges and thereby influence the composition of the jury. It thus created a protectable interest which the state "may not constitutionally depriv[e] ... without appropriate procedural safeguards." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). This Court has applied this principle to state-created criminal-procedural rights like the right at issue here. See, *e.g.*, *Evitts* v. *Lucey*, 469 U.S. 387, 400-01 (1985) (when state establishes right to direct criminal appeal, such appeals cannot be withdrawn without due process); *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (when state commits sentencing to juries, defendants gain a liberty interest in exercise of jury's discretion that cannot be deprived arbitrarily).

Respondent thus distracts from the issue when it emphasizes that peremptory challenges are a "state-created trial tool" that "may be withheld altogether." Opp'n 16-17. The state may, in a non-arbitrary fashion, deprive *both* the prosecution and a criminal defendant the right to exercise peremptory challenges without offending the Constitution. But it does not follow that, when a trial court misapplies reverse-*Batson* law and deprives the defendant of the effect of his right to a peremptory challenge resulting in a juror who should have been excused being seated, no constitutional right is implicated. The cases above and those cited in the petition, Pet. 19-20, 23-24, all demonstrate that the defendant's right to due process and an impartial jury were both infringed by the trial court's error.[1]

On respondent's flawed reasoning no constitutional right would be implicated even if the trial court erroneously rejected *every* peremptory challenge of the defense on reverse-*Batson* grounds (thus seating a jury made up *entirely* of jurors who should have been excluded pursuant to the defendant's exercise of his rights), but allowed the prosecution to exercise its challenges freely. To give the prosecution more power than the defense over the composition of the jury offends the Constitution. And, from the point of view

---

[1] Respondent is also wrong when it argues that the Illinois Supreme Court decided this case on independent state law grounds that are adequate to support the judgment. Opp'n 17-18. The Illinois Supreme Court unambiguously based its analysis on this Court's decisions in reaching both of the holdings necessary to support its judgment: that the reverse-*Batson* error was subject to harmless-error review, and that the error was harmless. Pet. App. 9a-12a. When a state supreme court expresely bases its decision on its understanding of *federal* constitutional law, it is beyond question that this Court has the authority to review that ruling. 28 U.S.C. § 1257.

of whether a constitutional right is implicated, there is no difference between a single reverse-*Batson* error affecting the composition of the jury and repeated reverse-*Batson* errors doing so.

It is worth noting that the Illinois Supreme Court has recognized that the trial court's error was of federal constitutional significance. *People* v. *Daniels*, 665 N.E.2d 1221, 1226-28 (Ill. 1996), cited by respondent, held that the erroneous denial of a defendant's statutory right to peremptory challenges violated not only state law, but federal due process. The Illinois Supreme Court in *Daniels* understood precisely what respondent fails to appreciate: a defendant establishes a constitutional violation by showing that he was denied the *effect* of a peremptory challenge, *i.e.*, that, but for the erroneous denial of the peremptory challenge, the defendant would have been able to excuse a juror who, in fact, was seated. *Id.* at 1227-28.

The Illinois Supreme Court's ruling in this case implicitly recognized that a federal constitutional right had been violated. The court specifically considered whether the error at issue was "structural," and hence warranted automatic reversal. Pet. App. 12a. This court has consistently identified structural defects as a subset of *constitutional* errors; that is, only errors of constitutional significance can be structural. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) ("[t]he second class of constitutional error we called 'structural defects'"); *Neder* v. *United States*, 527 U.S. 1, 7 (1999) ("we have recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards" (internal quotation marks omitted)); *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (defining "category of constitutional

errors which are not subject to harmless error" as "structural defect[s]"). Had the Illinois Supreme Court thought the trial court's error implicated only state law, and no federal constitutional rights, then it would have simply said that the error could not be structural because it is not one of constitutional significance. But it said no such thing.[2] Pet. App. 12a.

In short, respondent's view that no constitutional right is at stake finds no support in either this Court's decisions or the reasoning of the Illinois Supreme Court. This Court's jurisdiction is secure.

2. The split of authority implicated by the petition is undeniable. Respondent makes various efforts to chip away at its breadth, all of which fail.

Respondent's failure to grasp the nature of the trial court's error causes it erroneously to conclude not only that this Court lacks jurisdiction, but also that this case does not present the very question that Justice Souter acknowledged awaits clarification from this Court, and that has frequently arisen in the context of erroneous denials of for-cause challenges. Opp'n 29-31. As detailed in the petition, the denial of the effect of a peremptory challenge can arise in two distinct ways: (1) where, as here, a juror is seated because the trial court erroneously applied the reverse-*Batson* rule to reject the defendant's peremptory challenge, and (2) when a defendant's for-cause challenge is erroneously rejected, causing the defendant to use a peremptory challenge to excuse the biased juror that the defendant establishes would

---

[2] The same view is implicit in Justice Souter's concurrence in *Martinez-Salazar*, 528 U.S. at 317-18 (Souter, J., concurring), where Justice Souter specifically raised the automatic-reversal/harmless-error question.

have been used to excuse a later juror in the venire who was seated. Pet. 3-4. Justice Souter was specifically addressing the latter circumstance. But regardless of how the error arises, the fundamental failure is the same: the trial court's error caused the seating of a juror who should have been excused. *All* the cases discussing whether automatic reversal applies that are cited in the petition, Pet. 3-6, therefore, reflect the depth of the split of authority regarding the issue presented here.

Respondent's various efforts to undermine the 7-2 split of authority that has developed out of the reverse-*Batson* context also fail. Respondent concedes that the Washington Supreme Court would have applied automatic reversal in petitioner's case while the Illinois Supreme Court applied harmless error analysis. Opp'n 19, 25. Oddly, respondent argues that the Washington Supreme Court's decision in *Vreen* was an "early outlier ... that the Washington courts, themselves, are likely to remedy." Opp'n 25. But not only was *Vreen* decided by Washington State's highest court, it was also handed down *after* this Court's decision in *Martinez-Salazar*. Respondent does not and cannot explain what would compel the Washington Supreme Court to reverse itself.

Respondent urges the Court to ignore the various decisions that pre-date *Martinez-Salazar* because *Martinez-Salazar* supposedly clarified the law. Opp'n 19-21. Such a reading of the decision is indefensible. *Martinez-Salazar* expressly did *not* reach the very question that respondent claims it decided. *Martinez-Salazar* merely stated that the suggestion in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), *overruled on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986), that the erroneous denial of a peremptory challenge requires automatic reversal, was *dicta*.

Martinez-Salazar, 528 U.S. at 317 n.4. Whether to elevate *Swain*'s *dicta* to the status of holding was not decided because the defendant in *Martinez-Salazar*, unlike petitioner, was not denied the effect of a peremptory challenge. Justice Souter left no doubt that the question remained open in his concurrence, where he called attention to the fact that the issue was not squarely presented, but that it might arise in another case. *Id.* at 317-18 (Souter, J., concurring). Because *Martinez-Salazar* does not itself change the law, but merely clarifies that the question has yet to be decided by the Supreme Court, lower court rulings prior to *Martinez-Salazar* remain good law in their respective jurisdictions.

Indeed, some courts prior to *Martinez-Salazar* had already acknowledged that the view expressed in *Swain* was *dicta*, and yet concluded that automatic reversal was required anyway. *United States* v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc); *United States* v. *McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998) (relying on *Annigoni*). Obviously, statements in *Martinez-Salazar* which confirm the premises of prior rulings would not cause any change in those rulings.

The same over-reading of *Martinez-Salazar* leads respondent to disregard the Minnesota Supreme Court's decision applying automatic reversal, simply because the Minnesota court did not cite *Martinez-Salazar*. Opp'n 22-23 (discussing *Angus* v. *State*, 695 N.W.2d 109 (Minn. 2005)). Because *Martinez-Salazar* left the question open, the failure of any lower court decision to cite *Martinez-Salazar* is a matter of insignificance.[3]

---

[3] Further, *Angus* expressly relied on *Annigoni*, and so the Minnesota court would have been aware of the view that *Swain*

Respondent's effort to disregard three cases, *United States* v. *Blanding*, 250 F.3d 858 (4th Cir. 2001), *Holder* v. *State*, 124 S.W.3d 439 (Ark. 2003), and *Parker* v. *State*, 778 A.2d 1096 (Md. 2001), further belies its misconception that *Martinez-Salazar* held that harmless error analysis applies. See Opp'n 22. All three decisions post-date *Martinez-Salazar*. If *Martinez-Salazar* had made clear that harmless error analysis was appropriate, then none of the cases would have reversed the respective convictions *without conducting any harmless error analysis at all*. Respondent tries to waive these cases aside by noting that the respective courts never discussed whether automatic reversal was appropriate. Opp'n 22. But what those courts *did* is just as clear a statement that automatic reversal is required as expressly so stating: all three courts reversed automatically without any analysis or discussion.

Respondent's suggestion that petitioner failed to cite "several" cases agreeing with the decision below only serves to deepen the split, not to eliminate it. Opp'n 25. The Pennsylvania Supreme Court has, like the Illinois Supreme Court, concluded that harmless error analysis applies. *Commonwealth* v. *Carson*, 741 A.2d 686 (Pa. 1999), *abrogated on other grounds by Commonwealth* v. *Freeman*, 827 A.2d 385 (Pa. 2003). That means that what petitioner characterized as a 7-2 split in the reverse-*Batson* context is, in fact, a 7-3 split, and what he characterized as a 18-16 split overall is, in fact, a 19-16 split.

The other cases respondent cites are irrelevant. *People* v. *Boyette*, 58 P.3d 391 (Cal. 2003), involved the erroneous denial of a defendant's for-cause

---

had not held that automatic reversal was required, as *Martinez-Salazar* later made clear. Opp'n 23.

challenge prompting him to use a peremptory challenge. *Id.* at 415-19. Because the record did not indicate that the defendant would have used the challenge he wasted to strike a different juror, the case was governed by *Ross*, 487 U.S. 81.

The two Second Circuit decisions that respondent cites, *Frazier* v. *New York*, 156 F. App'x 423, 425 (2d Cir. 2005) and *Vega* v. *Portuondo*, 120 F. App'x 380, 383 (2d Cir. 2005) are habeas decisions, and underscore petitioner's view that the law remains unsettled. In both cases, the trial court had committed reverse-*Batson* error, and the Second Circuit affirmed the denial of habeas relief because the Supreme Court has not "clearly established" that such errors are subject to automatic reversal, as required by 28 U.S.C. § 2254(d)(1). *Frazier*, 156 F. App'x. at 425; *Vega*, 120 F. App'x at 383. Far from supporting respondent's view, these decisions confirm petitioner's point that the law remains unsettled, requiring this Court's review.

The 19-16 split of authority is real and fully implicated here. Its depth and persistence post-*Martinez-Salazar* belies respondent's contention that courts will achieve uniformity without this Court's intervention.

3. Respondent's final arrow in its quiver is a weakly reasoned suggestion that this case presents a poor vehicle because the Court would be required to review whether the Illinois Supreme Court's application of the reverse-*Batson* rule was correct. Opp'n 26-29. This Court need not and should not consider that question.

Respondent has not filed a conditional cross-petition for certiorari, see Sup. Ct. R. 12.5, which means that this Court may lack jurisdiction to

consider respondent's belated assertion of error below. See *Burks* v. *United States*, 437 U.S. 1, 5 (1978) (holding that government's failure to cross-petition closed off issue whether evidence was sufficient, even though review of such issue might have avoided need to decide double jeopardy claim, on which Court granted review). Even if the Court has jurisdiction to review the issue, it is clear that the Court is not *obliged* to do so. The decision to present an independent ground for affirmance is at best addressed to the discretion of the Court. And the Court exercises its discretion applying the same standards that it would if the issue were presented in a petition (or cross-petition) for certiorari. Respondent has made no effort to explain why the fact-bound, garden-variety application of reverse-*Batson* standards is worthy of this Court's review. Because it is not, this Court should treat the issue as finally decided and consider the question presented in the petition alone. See, *e.g.*, *Nobles*, 422 U.S. at 241 n.16.[4]

---

[4] In any event, respondent does not deny that there was no prima facie case of gender discrimination here. Instead, respondent argues that, under this Court's decision in *Hernandez* v. *New York*, 500 U.S. 352 (1991), sufficient evidence of gender discrimination eventually emerged, and so the error is moot. Opp'n 27-28. Respondent over-reads *Hernandez*, which did not decide that an appellate court may uphold the denial, on reverse-*Batson* grounds, of a defendant's peremptory challenge without reviewing the trial court's finding of a prima facie case of discrimination. As the Eleventh Circuit has observed, this Court's repeated pronouncements that the prima facie case requirement is integral to the *Batson* analysis clearly indicate that the Illinois Supreme Court ruled correctly here. *United States* v. *Stewart*, 65 F.3d 918, 924 (11th Cir. 1995).

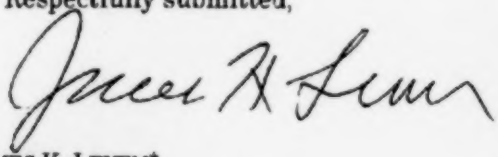
* * *

A specific juror was seated at petitioner's trial who, were it not for the misapplication of the reverse-*Batson* rule that deprived petitioner of the use of his peremptory challenge, would have been dismissed. This case thus presents an ideal vehicle for resolving a deep split of authority on an important question affecting the structure of criminal trials that this Court acknowledged in *Martinez-Salazar* remains open.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



ROBERT N. HOCHMAN
AARON S. MANDEL
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

July 2, 2008

REPLY BRIEF

19 (9)

No. 07-9995

Supreme Court, U.S.
FILED
FEB 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court for the State of Illinois

REPLY BRIEF OF THE PETITIONER

ROBERT N. HOCHMAN
AARON S. MANDEL
JEREMY G. MALLORY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

February 12, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH HBUBBA

178

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. FEDERAL LAW DETERMINES WHETHER THE ERROR IN THIS CASE IS SUBJECT TO HARMLESS-ERROR ANALYSIS OR AUTOMATIC REVERSAL, WITHOUT REGARD TO ANY FEDERAL CONSTITUTIONAL VIOLATION	4
II. PETITIONER WAS TRIED BEFORE AN UNLAWFUL ADJUDICATOR, WHICH IS STRUCTURAL ERROR	8
A. Under Federal Law, A Judgment From Proceedings Involving An Unlawful Adjudicator Is Reversed Automatically	8
B. Trial Before An Unlawful Adjudicator Violates Due Process	13
III. THE WRONGFUL SEATING OF A JUROR IS STRUCTURAL ERROR BECAUSE HARMLESS-ERROR REVIEW IS IMPOSSIBLE TO CONDUCT	18
IV. THE SEATING OF A JUROR WHOM THE DEFENDANT HAS LAWFULLY STRUCK IS STRUCTURAL ERROR BECAUSE IT CREATES AN UNACCEPTABLE RISK OF BIAS	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES Page

Am. Constr. Co. v. *Jacksonville Tampa & Key W. Ry.*, 148 U.S. 372 (1893) 14
Ashwander v. *TVA*, 297 U.S. 288 (1936) 7
Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 (1947) 9
Boynton v. *Virginia*, 364 U.S. 454 (1960) 7
Bruton v. *United States*, 391 U.S. 123 (1968) 21
Chapman v. *California*, 386 U.S. 18 (1967) . 4, 22
Evitts v. *Lucey*, 469 U.S. 387 (1985) 3, 26
Georgia v. *McCullom*, 505 U.S. 42 (1992) 17
Gomez v. *United States*, 490 U.S. 858 (1989) 9, 15
Hernandez v. *New York*, 500 U.S. 352 (1991) 9
Hicks v. *Oklahoma*, 447 U.S. 343 (1980) 14, 26
Jackson v. *Virginia*, 443 U.S. 307 (1979) 10
Kerwin v. *People*, 96 Ill. 206 (1880) 9
Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) 7
Liljeberg v. *Health Services. Acquisition Corp.*, 486 U.S. 847 (1988) 10, 11
McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984) 20
Michigan v. *Long*, 463 U.S. 1032 (1983) 1, 6
Neder v. *United States*, 527 U.S. 1 (1999) 1, 3, 22
Neese v. *S. Ry.*, 350 U.S. 77 (1955) 7
People v. *Bell*, 702 N.W.2d 128 (Mich. 2005) 5
Peters v. *Kiff*, 407 U.S. 493 (1972) 11, 19, 24
Powers v. *Ohio*, 499 U.S. 400 (1991) 11
Ross v. *Oklahoma*, 487 U.S. 81 (1988) 2, 11, 12, 13

TABLE OF AUTHORITIES—continued

	Page
Rushen v. *Spain*, 464 U.S. 114 (1983)	20
Schneble v. *Florida*, 405 U.S. 427 (1972)	21
Sullivan v. *Louisana*, 508 U.S. 275 (1993)	21, 23
Swain v. *Alabama*, 380 U.S. 202 (1965), *overruled in part on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986)	17
Turner v. *Louisiana*, 379 U.S. 466 (1965)	25
United States v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685 (1960)	10
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006)	18, 19
United States v. *Hasting*, 461 U.S. 499 (1983)	21
United States v. *Martinez-Salazar*, 528 U.S. 304 (2000)	2, 12
United States v. *Powell*, 469 U.S. 57 (1984)	10
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	11, 19
William Cramp & Sons Ship & Engine Bldg. Co. v. *Int'l Curtis Marine Turbine Co.*, 228 U.S. 645 (1913)	14
Wingo v. *Wedding*, 418 U.S. 461 (1974)	9, 10, 23
Yee v. *City of Escondido*, 503 U.S. 519 (1992)	7
Young v. *United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)	2, 20

STATUTE

705 ILCS 305/2	8, 9

SCHOLARLY AUTHORITY

William Blackstone, 3 *Commentaries*	9

REPLY BRIEF

Petitioner was found guilty by a jury that included an unlawful adjudicator. It is difficult to conceive of anything more structural than the legal authority of the body charged with determining factual guilt or innocence. The legitimacy of the adjudication of guilt cannot be separated from the lawful authority of the adjudicator—if the adjudicator was unlawful, then the judgment is void and requires automatic reversal. Pet. Br. 11-20.

Respondent does not deny that this Court has, without exception, automatically reversed every judgment issued by a tribunal with an unlawful adjudicator. Respondent even concedes that, as a matter of federal law, a court with an unlawful adjudicator is no court at all. Resp. Br. 30. Respondent nonetheless shoves this principle aside by arguing that (1) only a rule of constitutional dimension can apply to this case arising out of state court and (2) the error here does not violate the federal Constitution. Both efforts to evade this Court's consistent and fundamental rule of law fail.

The first assertion rests on a false premise that pervades respondent's brief: that the Illinois Supreme Court applied Illinois state harmless-error law. Resp. Br. 9, 15, 18, 20-21, 25. The Illinois Supreme Court applied what it believed was *this* Court's harmless-error law, relying on its understanding of *this* Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999). JA 164-72. Indeed, respondent asserts that the Illinois Supreme Court "followed *Neder*[] ... to the letter." Resp. Br. 50. This Court has the authority to correct the Illinois Supreme Court's erroneous understanding of federal harmless-error law. *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983).

The second assertion ignores the narrow scope of petitioner's claim. Petitioner asserts that trial before an unlawful adjudicator violates due process. Respondent counters primarily with this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988). Resp. Br. 13-14, 17, 29. But *Ross* did not consider the question here, much less reject it, because that case did not involve a trial before an unlawful adjudicator. The objectionable potential juror in *Ross* was excluded from the jury. See also *United States* v. *Martinez-Salazar*, 528 U.S. 304, 317-18 (2000) (Souter, J., concurring). Respondent also observes that this Court has never held that constitutional principles of due process compel automatically reversing decisions involving an unlawful adjudicator. Resp. Br. 29-30. But respondent does not and cannot say that this Court has ever held that trial before an unlawful adjudicator is consistent with due process. And respondent offers no reason why this Court should so hold. Put simply, trial before a tribunal that, due to the unlawfulness of the adjudicator, was effectively no court at all, denied petitioner the process he was due under the 14th Amendment.

The error here also makes harmless-error analysis impossible. Pet. Br. 20-26. Respondent rejects this independent basis for reversal by arguing that harmless-error analysis can apply even when it is impossible to conduct. Resp. Br. 46. There is no support for that self-contradictory assertion. Respondent further asserts that harmless-error analysis can be applied by asking whether any juror who adjudicated petitioner's guilt was actually biased. *Id.* at 47-48. But that "would not be sensitive to the fundamental nature of the error committed." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S.

787, 812 (1987) (plurality). The juror here was not lawfully permitted to sit because petitioner struck her peremptorily. She was thus an invalid juror for reasons that do not require proof of actual bias. Respondent also denies that harmless-error analysis here would require the reviewing court to undertake independent evaluation of the record as a whole in contravention of the rule against directed verdicts of guilt in criminal cases. Resp. Br. 49-53. The Illinois Supreme Court's analysis speaks for itself: it believed it was permitted to review the entire record to determine whether any rational jury could reasonably have acquitted. JA 164-72. Respondent never explains how that process differs from a trial court directing a verdict of guilt. Even this Court's decision in *Neder* disclaims the suggestion that it was authorizing a reviewing court to consider the strength of the entire record. 527 U.S. at 11, 16.

Finally, respondent urges this Court to reject petitioner's claim that the risk of bias inherent in the erroneous rejection of a defendant's peremptory challenge violates due process and warrants automatic reversal. Once again, respondent mischaracterizes petitioner's argument, repeatedly suggesting that a ruling in petitioner's favor necessarily entails constitutionalizing the right to peremptory challenges. Resp. Br. 28, 30, 31, 35-36. That is not so. Just as this Court's decision requiring effective assistance of counsel on appeal, *Evitts* v. *Lucey*, 469 U.S. 387 (1985), did not constitutionalize the right to a direct criminal appeal, a ruling in petitioner's favor here would not constitutionalize the right to peremptory challenges. But if the state chooses to provide peremptory challenges, it is empowering the defendant to participate in the process of ensuring a fair trial before an impartial jury. Having made that

choice, thus aligning itself with an unbroken (but not constitutionally compelled) tradition in American law, the state introduces a constitutionally unacceptable risk of bias when it wrongfully rejects a defendant's challenge to a particular juror. This Court's decisions requiring automatic reversal in the face of a risk of bias thus support automatic reversal here.

I. FEDERAL LAW DETERMINES WHETHER THE ERROR IN THIS CASE IS SUBJECT TO HARMLESS-ERROR ANALYSIS OR AUTOMATIC REVERSAL, WITHOUT REGARD TO ANY FEDERAL CONSTITUTIONAL VIOLATION.

Respondent contends that this Court may not reject the ruling of the Illinois Supreme Court without deciding whether the failure to honor petitioner's lawful peremptory challenge of Ms. Gomez violated any federal constitutional right. Respondent's position depends upon a demonstrably false proposition: that the Illinois Supreme Court applied Illinois' own harmless-error law.

Respondent asserts that the Illinois Supreme Court must have applied its own harmless-error law because it "conclud[ed] that it need not decide whether there was constitutional error at all to resolve the appeal." Resp. Br. 9; see also U.S. Br. 13-14. Respondent has it backwards. The fact that the Illinois Supreme Court did not decide whether there was any constitutional error conclusively proves that it applied what it thought was *federal* harmless-error/automatic-reversal principles.

Federal law determines whether an error in violation of the federal constitution is structural or subject to harmless-error analysis. *Chapman* v.

California, 386 U.S. 18, 20-21 (1967). Thus, the Illinois Supreme Court could apply its own law for determining whether an error requires automatic reversal only if it had held that there was no violation of the federal constitution. But it concluded that it did not need to reach the question whether a federal constitutional right had been violated because, in its (erroneous) view, *federal* law for determining whether an error is structural permitted it to review the record for prejudice. In short, the Illinois Supreme Court's ruling has postured this case so that it squarely presents the harmless-error/automatic-reversal question as a matter of *federal* law.

The Illinois Supreme Court's decision to apply federal law is also apparent from its reliance on this Court's decision in *Neder*. JA 164-72. Indeed, respondent asserts (wrongly) that the Illinois Supreme Court "followed *Neder*[] ... to the letter." Resp. Br. 50. Nothing in the Illinois Supreme Court's decision indicates that it was applying state law rules for determining whether an error is subject to harmless-error review or automatic reversal. Even the cited Illinois state court decisions purported to apply *Neder*. JA 164-65, 171-72.

The Illinois Supreme Court's decision contrasts in this regard with that of the Michigan Supreme Court in *People* v. *Bell*, 702 N.W.2d 128 (Mich. 2005). In *dicta*, the *Bell* court indicated that it would apply its own harmless-error principles to determine that reverse-*Batson* errors are subject to harmless-error review.[1] The Illinois Supreme Court did not indicate that it was applying its own harmless-error

---

[1] The harmless-error discussion in *Bell* was *dicta* because the court held that no error had occurred. 702 N.W.2d at 137-38, 141.

principles. As a result, this Court may review the Illinois Supreme Court's misapplication of *federal* harmless-error/automatic-reversal principles in this case.

Ultimately, respondent concedes that the Illinois Supreme Court never *explicitly* stated that it was relying on its own law for determining whether to apply harmless-error analysis or automatic reversal. The most respondent (and the United States) can say is that the state law ground was "implicit[]." Resp. Br. 9; U.S. Br. 13-14. But even if that were true (and for the reasons discussed above, it is not), that would amount to an admission that no state-law basis was clearly stated. Under *Michigan* v. *Long*, 463 U.S. at 1040-41, the absence of a clearly stated adequate and independent state ground for the ruling authorizes this Court to consider the question as a matter of federal law.

As a result, respondent's assertion that a ruling in petitioner's favor by this Court would "'federalize' and require automatic reversal for any misapplication of countless state procedural rules," Resp. Br. 25, is wrong. Likewise, respondent wrongly asserts that, because petitioner's right to strike Ms. Gomez peremptorily is based in state, not federal law, there is no basis in federal law to reverse the Illinois Supreme Court's ruling that the error may be reviewed for harmlessness. *Id.* at 9. The Illinois Supreme Court, not petitioner, "federalized" this case by basing its decision on an erroneous understanding of federal law.

For the same reason, respondent is wrong to assert that "[n]one of [this Court's] decisions [automatically reversing judgments in which unlawful adjudicators participated] has any bearing here." *Id.* at 20. Those decisions are as appropriate for this Court's

consideration here as is *Neder*, which respondent frequently invokes. The full body of this Court's decisions considering whether to apply harmless-error analysis or automatic reversal can be considered, without having first to determine that any of petitioner's constitutional rights have been violated. Because the Illinois Supreme Court hinged its ruling on its misunderstanding of federal law, this Court can and should correct that misunderstanding. Put simply, this Court should consider whether *federal* law requires automatic reversal here.[2]

None of this is to say that the error here did not violate the federal Constitution. And as discussed in each of the succeeding sections, each of the independent bases for concluding that automatic reversal

---

[2] Respondent in passing asserts that petitioner has waived his argument that federal rules for determining whether harmless-error analysis or automatic reversal apply, independent of any constitutional violation. Resp. Br. 16. There has been no waiver. Respondent does not deny that petitioner has consistently argued that he was entitled to a new trial because Ms. Gomez was wrongly seated over his lawful peremptory challenge. Petitioner is entitled in this Court to present any argument in support of the claim he has properly preserved. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That is especially true here, where resolving this case on petitioner's non-constitutional ground would reflect this Court's preference to avoid reaching constitutional issues when it is unnecessary to do so. *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). This Court has considered non-constitutional grounds of decision even when the question presented was phrased exclusively in constitutional terms. *E.g.*, *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960); *Neese* v. *S. Ry.*, 350 U.S. 77, 78 (1955) (per curiam).

applies can be grounded in a related violation of a federal constitutional right. However, for the reasons stated above, this Court need not find such a violation to reverse the Illinois Supreme Court.

II. PETITIONER WAS TRIED BEFORE AN UNLAWFUL ADJUDICATOR, WHICH IS STRUCTURAL ERROR.

A. Under Federal Law, A Judgment From Proceedings Involving An Unlawful Adjudicator Is Reversed Automatically.

This Court's unbroken line of decisions automatically reversing proceedings involving an unlawful adjudicator warrants ordering automatic reversal here. Pet. Br. 13-19 (citing and discussing cases). Indeed, respondent concedes that it is "[t]rue enough[] as a matter of federal law" that a court with an unlawful adjudicator is "'virtually no court at all'" and its judgment is void. Resp. Br. 30 (quoting *William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 652 (1913)).

Respondent and the United States both urge this Court to ignore its consistent reversal of trials involving unlawful adjudicators because, they say, this Court's cases are confined to circumstances in which the adjudicator acted without lawful statutory authority. Resp. Br. 18; U.S. Br. 28. As they see it, petitioner's trial did not involve an unlawful adjudicator at all. Respondent points to the Illinois statute that describes the "legal qualifications" that jurors "must have" in Illinois, 705 ILCS 305/2, and asserts that Ms. Gomez possessed certain of those requirements, including residency, age, English literacy, and U.S. citizenship. Resp. Br. 20. Respondent ignores the jury qualification that is directly

relevant: that jurors be "[f]ree from all legal exception." 705 ILCS 305/2(3). The Illinois Supreme Court has long held that "legal exception" includes all exceptions at common law still in force in 1874. *Kerwin* v. *People*, 96 Ill. 206 (1880). One of the common law exceptions to jury service that has always been recognized is the peremptory challenge. See William Blackstone, 3 *Commentaries* *364-65 (using "exception" and "challenge" interchangeably in jury selection context). The Illinois Supreme Court thus determined that Ms. Gomez was subject to a lawful exception when it ruled that petitioner had lawfully exercised his right to excuse her peremptorily.[3] JA 157-58. She was not a lawful adjudicator of petitioner's guilt.

As a result, the tribunal that declared petitioner guilty was without statutory authority to render judgment. That is why cases such as *Gomez* v. *United States*, 490 U.S. 858, 876 (1989), *Wingo* v. *Wedding*, 418 U.S. 461, 466-67, 473-74 (1974), *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 135

---

[3] Respondent, in a footnote, attempts to bolster its claim that Ms. Gomez was a lawful juror by asserting that the Illinois Supreme Court wrongly ruled that petitioner lawfully struck Ms. Gomez from the jury. Resp. Br. 43 & n.3. Respondent takes the view that an erroneous finding of prima facie discrimination (as here) is mooted by a subsequent ruling that the strike was discriminatory. But respondent did not file a conditional cross-petition asking this Court to review the Illinois Supreme Court's application of the reverse-*Batson* rule here. So the parties have not briefed the issue, and *Hernandez* v. *New York*, 500 U.S. 352 (1991) (plurality), does not resolve it. Further, the Illinois Supreme Court held both that there was no prima facie case of discrimination *and* that the articulated grounds for the challenge were sufficiently neutral to preclude an inference of discrimination, JA 157. As a result, the scope of *Hernandez* is not even implicated here.

(1947), and *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960), so strongly support automatic reversal here. Jurors are the central decisionmakers in a criminal trial. They possess the unreviewable authority to declare a defendant not guilty. *United States* v. *Powell*, 469 U.S. 57, 65 (1984). And their determination of guilt is, as a factual matter, reviewable only under the demanding sufficiency-of-the-evidence standard. *Jackson* v. *Virginia*, 443 U.S. 307, 318-19 (1979). The extraordinary authority of the jury is far more consequential than the magistrate who unlawfully presided over jury selection alone in *Gomez*. The judgments of jurors are far more insulated from effective review than those of the magistrate who unlawfully presided over the habeas corpus proceeding in *Wingo* (whose rulings were subject to *de novo* review, 418 U.S. at 473-74), or the unlawfully constituted appellate panels that presided in *Ayrshire Collieries* and *American-Foreign Steamship Corp.* Yet in each of those cases this Court determined that the bare presence of an unlawful adjudicator, without even a claim of potential bias, much less a showing of actual bias, required automatic reversal. This Court automatically reversed in each case because the errors went to the core of legitimacy of the judgments of those tribunals. The error here strikes at the core of a criminal judgment's legitimacy even more directly.[4]

---

[4] *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), relied upon by the United States but not respondent, does not suggest that the error of trying a case before an unlawful adjudicator may be reviewed for harmlessness rather than automatically reversed. In *Liljeberg*, the Court held that a judge is disqualified under 28 U.S.C. § 455(a) when a reasonable person would question his impartiality, even when the judge is not aware of facts leading to his disqualification. *Id.* at 860-61.

This Court's consistency in automatically reversing judgments of courts involving judges or judicial panels without lawful authority is matched by its consistency with regard to juries that are unlawfully composed. Pet. Br. 13, 16-17. It is true, as respondent argues, that cases such as *Peters* v. *Kiff*, 407 U.S. 493 (1972) (plurality), and *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), involved discrimination in the selection of the jury. Resp. Br. 24-25. But these decisions are important here because they highlight the centrality of the jury in the criminal process, and underscore that when the "composition of the trier of fact itself is called into question," *Powers* v. *Ohio*, 499 U.S. 400, 412-13 (1991), then so too is the "'integrity of the judicial process,'" *id.* at 411. Automatic reversal is appropriate under these circumstances.

Applying the automatic reversal rule for judgments from proceedings with unlawful adjudicators in this case would not contravene this Court's decision in *Ross*, 487 U.S. 81. Respondent's reliance on *Ross* misunderstands both petitioner's narrow argument, and *Ross*'s holding.

Contrary to respondent's suggestion, Resp. Br. 16, petitioner is not arguing that any error that arises during the course of composing the tribunal would require automatic reversal as a matter of federal law. Petitioner's claim is rooted in the fact that under Illinois law, petitioner lawfully voided Ms. Gomez as

---

The issue did not arise during the trial itself, or even on review of the judgment. The issue arose *after* the litigation was "closed" and was brought forward through the procedural mechanism of Fed. R. Civ. P. 60(b). *Id.* at 858, 862 n.9. The need to determine whether justice required vacatur of the judgment and remand for new trial drew directly from the standards applicable to motions under Rule 60(b)(6) for reopening judgments that have been closed. *Id.* at 863-65.

a juror. As a result, when she was seated, his jury included an individual without lawful authority to adjudicate his guilt. By contrast, none of the jurors who adjudicated Ross's guilt lacked lawful authority to do so. It is true that an error occurred during jury selection in both cases. But the errors are critically different: in Ross's case, the error did not produce an unlawful adjudicator while here it did. Respondent goes to extraordinary lengths to scrub this crucial distinction from this case, including rewriting the question presented so that the critical fact—that the lawfully challenged juror was seated—is deleted. Compare Pet. Br. i, with Resp. Br. i.

Respondent states that this Court in *Ross* expressly rejected the argument "'that any error which affects the composition of the jury must result in reversal,'" Resp. Br. 17 (quoting *Ross*, 487 U.S. at 87 n.2), as if the Court thereby held that an error like that here can be reviewed for harmlessness. That is a mischaracterization of the discussion in *Ross*. As the opinion makes clear, the Court was considering Ross's broad argument that any error raising even the mere possibility that the composition of the jury was affected requires automatic reversal. 487 U.S. at 87. The footnote itself endeavors to explain how the composition of the jury might be completely altered by an error (if, for example, the judge dismisses the entire venire in light of the error and restarts jury selection) without requiring reversal of a conviction. *Id.* at 87 n.2. Petitioner agrees: if the entire venire is changed and only lawful adjudicators of guilt are seated, then the rule petitioner proposes would not apply. The critical question is whether any unlawful adjudicator was seated. The answer here is yes; in both *Ross* and *Martinez-Salazar*, 528 U.S. 304, the

answer was no.[5] Requiring automatic reversal here is in no way inconsistent with this Court's decisions affirming the convictions in those cases.

B. Trial Before An Unlawful Adjudicator Violates Due Process.

As discussed above and in petitioner's brief, this Court can reverse the Illinois Supreme Court's ruling and apply its rule requiring automatic reversal of judgments from proceedings with unlawful adjudicators without first determining that the error violated the Due Process Clause. Nonetheless, if this Court considers the issue, it should conclude that trial before a jury that includes an individual without lawful authority to sit violates due process.

Both respondent and the United States urge this Court to hold that trial before an unlawful adjudicator does not violate due process primarily because this Court has never said that it violates due process. Resp. Br. 29-30; U.S. Br. 14-15. But that falls far short of explaining how trial before an unlawful adjudicator could be considered consistent with due process. Given this Court's consistent rationale for automatically rejecting proceedings involving unlawful adjudicators—because they cast grave doubt on

---

[5] *Ross* provides another way to get to the same distinction. As this Court observed, in *Ross* the petitioner was not denied anything to which state law entitled him. Ross used his peremptory challenge just as state law anticipated he would: to correct a trial judge's erroneous failure to remove a juror who should have been excused for cause. 487 U.S. at 89. Thus the error caused Ross to use a peremptory challenge he should not have had to use, but did not cause the seating of an unlawful juror. Here, by contrast, petitioner was wrongly denied his lawful right to preclude Ms. Gomez from sitting. Thus, the petitioner's, but not Ross's, lost peremptory challenge resulted in an unlawful juror.

the legitimacy of the proceedings—it would be highly incongruous to conclude that such a proceeding is nonetheless consistent with due process.

As this Court has repeatedly recognized, the lawfulness of the adjudicator is critical to the authority of the judgment itself. A court without lawful authority to judge is "virtually no court at all." *William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtis Marine Turbine Co.*, 228 U.S. 645, 652 (1913). This Court treats judgments from adjudicators without lawful authority as "perhaps absolutely void." *Am. Constr. Co.* v. *Jacksonville Tampa & Key W. Ry.*, 148 U.S. 372, 387 (1893). It is hard to imagine what else might be "due" a criminal defendant than that his judgment of conviction be rendered by a body lawfully authorized to deprive him of his liberty.

Indeed, this Court has found a violation of due process on less. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), Oklahoma's habitual offender statute mandated a 40-year sentence for Hicks's conviction, and the state trial judge instructed the jury to sentence Hicks to 40 years if it convicted. *Id.* at 344-45. Subsequently, the Oklahoma Court of Criminal Appeals ruled in a different case that the statute requiring Hicks to be sentenced to 40 years violated the Oklahoma constitution. *Id.* at 345. Hicks was entitled under state law to have the jury consider whether to sentence him to a number of years not less than 10. *Id.* at 346. This Court determined that it was a violation of due process for the Oklahoma state courts to reject Hicks's request to be resentenced by a jury acting with the degree of discretion they lawfully possessed.

In effect, *Hicks* involved an unlawful sentencer under state law: the court erroneously seized the

power to sentence from the jury. This Court held that when the state judge violated state (not federal) law by ordering a particular sentence he had no lawful authority to order, Hicks's due process rights were violated. If it violates the 14th Amendment's Due Process Clause for the adjudicator of a criminal defendant's *sentence* to be without lawful authority as a matter of state law, then *a fortiori* it violates the Due Process Clause for a criminal defendant's *adjudication of guilt* to be determined by an adjudicator without lawful authority.

In *Gomez*, this Court considered a proceeding in which the unlawful adjudicator played even less of a role than in this case or *Hicks*. The magistrate who was without authority presided over jury selection only. 490 U.S. at 860-61. Yet this Court not only ordered reversal without inquiring into prejudice (though that is significant), but it also equated the violation of "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," with the "basic fair trial right[]" to an impartial adjudicator. *Id.* at 876.

In short, it makes little sense for this Court to confine to its supervisory power over federal courts the rationale of its decisions requiring automatic reversal for proceedings involving an unlawful adjudicator. That rationale fits comfortably with the basic protections of the Due Process Clause.

Respondent and the United States suggest that acknowledging that state criminal proceedings involving unlawful adjudicators violate the Due Process Clause would have dire and expansive consequences. None of the concerns they express warrants rejecting petitioner's Due Process Clause argument.

This Court, of course, need not today decide whether due process is violated and automatic reversal is required when individuals are seated who fail to meet other state law criteria for jury service (whether as a matter of age or residency or felony status or capacity to understand English). Resp. Br. 26-27; see U.S. Br. 16-18. And it is pure conjecture, and fairly far-flung conjecture at that, that such errors will occur with any frequency, if at all. What is clear, however, is that there would be nothing odd about such a ruling. Such state laws reflect each state's judgment about who is sufficiently mature to adjudicate the guilt of another (age), or how to define the relevant community that will pass judgment on the defendant (residency), or whether those who have violated the law are fit to sit in judgment of others who stand accused of doing so (felon status), or even whether one could adequately understand the proceedings and deliberations such that the judgment is arrived at rationally (capacity to speak English). That states may differ on each criterion does not make them any less meaningful a restriction on who is and is not a lawful adjudicator. And the fact that states will vary on these criteria does not mean that the meaning of the Due Process Clause varies, as both respondent and the United States suggest. Resp. Br. 26; U.S. Br. 17. It would remain constant: a defendant has a federal constitutional right to adjudication before a tribunal that includes only those with lawful authority to judge.

Respondent and the United States also suggest that a rule of automatic reversal will dissuade prosecutors and judges from vigorously defending the rights that *Batson* and its progeny exist to protect. Resp. Br. 50; U.S. Br. 25-26. This speculation is groundless. Until this Court's 2000 decision in *Martinez-Salazar*, this

Court's statement in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), requiring automatic reversal whenever a defendant was wrongfully denied a peremptory challenge, was unquestioned. Thus, automatic reversal was the rule when the Court first applied *Batson*'s restrictions to defense counsel's exercise of peremptory challenges in *Georgia* v. *McCullom*, 505 U.S. 42 (1992). Respondent does not suggest that the specter of automatic reversal has chilled enforcement of the rule of nondiscrimination in jury selection from its inception, and there is no reason to believe that has been or would be true.

Respondent ventures into the absurd when it predicts that if this Court holds that the error here requires automatic reversal, counsel for defendants will exercise their peremptory challenges "strategically on jurors (like Gomez) who may trigger *Batson* rulings that can later be used to force an automatic reversal." Resp. Br. 11-12. Respondent apparently believes that defense counsel will use peremptory challenges to strike potential jurors they believe to be "clearly neutral or defense friendly," *Id.* at 50, in a way that appears to the trial judge to be discriminatory, but really is not, in an effort to bait the trial judge into an erroneous reverse-*Batson* ruling, in the hopes that counsel will be able to persuade an appellate court of that error, all so the defendant can be retried. Such irrational and unseemly speculation should not occupy this Court.

There is thus no reason to shy away from acknowledging what common sense suggests: trial before an unlawful adjudicator is not consistent with basic fairness and violates due process. Thus if this Court determines that the federal rule requiring automatic reversal of judgments from proceedings involving unlawful adjudicators can be applied only if

such proceedings violate the federal Constitution, it should so hold.

III. THE WRONGFUL SEATING OF A JUROR IS STRUCTURAL ERROR BECAUSE HARMLESS-ERROR REVIEW IS IMPOSSIBLE TO CONDUCT.

Federal law provides an independent reason to apply automatic reversal here: harmless-error analysis is impossible to conduct. A reviewing court cannot conduct harmless-error analysis without improperly substituting its own judgment regarding guilt or innocence for the constitutionally protected right of a determination by a lawful jury.[6]

This Court has clearly stated that "the difficulty of assessing the effect of the error" can, standing alone, provide the basis for requiring automatic reversal. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (citing *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984)). Respondent inexplicably denies this proposition of law, citing the same footnote from *Gonzalez-Lopez* in which this Court stated it. Resp.

---

[6] This federal-law basis for requiring automatic reversal can be applied to reverse the Illinois Supreme Court's ruling even if this Court determines the Illinois court applied *state* law in determining that harmless-error analysis applied (contrary to the argument in Section I above) and even if this Court determines that the error here did not violate the Due Process Clause. (Of course, acceptance of either of those arguments would fully support applying the federal rule of automatic reversal for errors that render harmless-error analysis impossible.) As discussed below, and in petitioner's brief, Pet. Br. 25-26, the way the Illinois Supreme Court conducted harmless-error review violated petitioner's right to a jury trial under the Sixth Amendment. This Court has the authority to order automatic reversal of the Illinois Supreme Court's violation of petitioner's Sixth Amendment right.

Br. 46. It is true that there is no "single, inflexible criterion" for determining when automatic reversal is required. 548 U.S. at 149 n.4. But that means that difficulty of conducting harmless-error analysis is not the *sole* basis for automatic reversal. It most certainly does not stand for the illogical proposition that harmless-error analysis can apply when it can't be applied.

Respondent does not deny that this Court, in *Vasquez*, 474 U.S. 254, and *Peters*, 407 U.S. 493, ruled that convictions stemming from proceedings in which a jury panel was unlawfully constituted require automatic reversal. Respondent does not deny that both of those decisions explained their reasoning not *only* in terms of the need to eradicate racial discrimination from the justice system, but *also* because a court could not assess the effect of the error. *Vasquez*, 474 U.S. at 264; *Peters*, 407 U.S. at 504. Instead, respondent cavalierly deems that express rationale "secondary." Resp. Br. 55. This Court should reject respondent's self-serving hierarchical categorization of this Court's rationales.

In any event, respondent wrongly asserts that a reviewing court can determine the effect of an unlawful juror on the trial's outcome. Respondent offers two ways to conduct harmless-error analysis here, one of which simply ignores the nature of the error, the other of which improperly replaces petitioner's right to a jury determination with the appellate court equivalent of a directed verdict. Neither is a permissible method of harmless-review.

Respondent first argues that harmless-error analysis "in cases of purported jury prejudice" simply involves inquiring into whether any juror was biased and thus excusable for cause. *Id.* at 47-48. But this approach ignores the requirement that harmless-

error analysis "be sensitive to the fundamental nature of the error committed." *Young*, 481 U.S. at 812 (plurality). The error here—the wrongful seating of a juror over a lawful peremptory challenge—presupposes that the challenged juror was not actually biased in any provable way. So review for actual bias in these circumstances would by definition *preclude* a finding of harm. Respondent is proposing a rule of automatic affirmance.

There is no authority for so completely sweeping under the rug the fact that petitioner's criminal trial was adjudicated by a juror who should have been excused by the court but was not. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548 (1984), does not stand for such a surprising result. It merely holds that "[t]o invalidate the result of a three-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* at 555. To order a retrial in that *civil* case would impose a substantial burden on the court in the absence of any "error" by the trial judge. In this case, by contrast, a *criminal* trial was adjudicated by a juror who should not have been present because of the trial court's legal error. Respondent's reliance on *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam), is equally unavailing. There was no suggestion that the improper *ex parte* contact between the judge and a juror in that case should have led to the juror's removal from the case at all.

Respondent's second proposed method of harmless-error review tracks that employed by the Illinois Supreme Court below. Resp. Br. 50. Harmless-error review here, respondent states, "merely" involves "determin[ing] whether the evidence set forth in the trial record is such that no rational jury would have

acquitted." *Id.* at 53. But as petitioner argued in its brief, Pet. Br. 25-26, such review amounts to a directed verdict of guilt, in violation of the Sixth Amendment, by an appellate court.

Respondent denies that there is any impropriety in imagining what a hypothetical "rational" juror would have done in Ms. Gomez's place. It asserts that this Court has authorized such an approach in the past. Resp. Br. 53. But neither *United States* v. *Hasting*, 461 U.S. 499 (1983), nor *Schneble* v. *Florida*, 405 U.S. 427 (1972), involved a reviewing court substituting a hypothetical juror for a real juror. In both cases, the Court was considering whether the jury that actually sat and actually heard all of the evidence and rendered a verdict of guilt would have reached a different conclusion had the error (improper prosecutorial comments in *Hasting*, and violation of the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968) in *Schneble*) not been committed. That is, in each case the Court could start from the proposition that *this* lawfully composed jury had adjudicated the defendant guilty, and the only question was whether there was any basis to conclude that the particular jury that had reached such a conclusion might have reasonably changed its mind had the error not been committed. Here, by contrast, the reviewing court would not be trying to determine whether the particular jury that adjudicated petitioner guilty would reasonably have changed its mind if the error had not occurred. The reviewing court is hypothesizing what a *different* jury could reasonably have done.

That distinction is why *Sullivan* v. *Louisana*, 508 U.S. 275 (1993), controls. Contrary to respondent's argument, Resp. Br. 52, the error here does "vitiate *all* the jury's findings," 508 U.S. at 281, because the

findings of *this* jury are not being reviewed. The harmless-error analysis advocated by the State and undertaken by the Illinois Supreme Court does not "'*preserve* a jury's findings, but it [impermissibly] *supplement[s]* those findings.'" *Neder*, 527 U.S. at 27 (Stevens, J., concurring). Indeed, it replaces them in full. This is not the harmless-error analysis envisioned by *Chapman*, which requires determining whether the error "contribute[d] to the *verdict obtained*." 386 U.S. at 24 (emphasis added). This is determining whether a verdict of "not guilty" could have been obtained. Even under the rubric of an "objective" standard like a "reasonable juror," appellate evaluation of the entire record to determine whether acquittal would have been appropriate is unprecedented. And it is indistinguishable from what a trial court unlawfully directing a verdict of guilt at the close of the evidence would do.[7] The United States asserts that the error was harmless because any "juror serving in Gomez's stead would have been *required* to find [petitioner] guilty." U.S. Br. 26 (emphasis added). A clearer statement of a directed verdict of guilt would be hard to find.

---

[7] Respondent asserts that petitioner has not "challenge[d] the determination that no rational jury would have acquitted ... because the trial evidence allows no other result." Resp. Br. 50. This is nonsense. Petitioner did not challenge the Illinois Supreme Court's application of harmless-error analysis to the facts of this case because he has asked this Court to apply a rule of automatic reversal that, by definition, is indifferent to the strength, or lack thereof, of the evidence supporting a guilty verdict. In fact, a reasonable jury readily could have acquitted petitioner. There was no physical evidence placing petitioner at the scene, respondent's principal witnesses were allegedly former gang members who had a motive to testify falsely against the petitioner, and whose credibility a reasonable jury could have rejected. JA 166-71.

The impropriety of substituting appellate consideration of the record for the right to have a lawful factfinder render a valid judgment is underscored by this Court's decision in *Wingo*, 418 U.S. 461. While *Wingo* involved an unlawful judicial officer (a magistrate instead of an Article III judge), it acknowledges that cases often turn on how the particular "factfinder appraises the facts," and thus ordered the judgment reversed automatically, even though appellate review of the judge's factual findings would have been *de novo*, and would have included not just a transcript of the proceedings but a recording of them as well. *Id.* at 466, 474. Respondent's (and the United States') argument, Resp. Br. 53; U.S. Br. 24, that the jury is not a critical part of the structure of a criminal trial because it does not create the trial record or exercise judgment over the evidence admitted, rings hollow. The essentially unreviewable role of *evaluating* the evidence is no less a critical component of the structure of a criminal trial than the role of creating that evidence. The kind of harmless-error analysis applied by the Illinois Supreme Court—one which affirms on the basis of "its view of what a reasonable jury would have done," *Sullivan*, 508 U.S. at 281—improperly substitutes judicial evaluation for the findings of a lawful jury to which petitioner is entitled as a matter of both state law and the Sixth Amendment.

IV. THE SEATING OF A JUROR WHOM THE DEFENDANT HAS LAWFULLY STRUCK IS STRUCTURAL ERROR BECAUSE IT CREATES AN UNACCEPTABLE RISK OF BIAS.

The final, independent reason automatic reversal is warranted here is that (1) this Court's decisions

require automatic reversal when the error involves an unacceptable risk of bias in the jury, and (2) the error here, denying petitioner his lawfully exercised peremptory challenge, carries a constitutionally unacceptable risk of bias. Pet. Br. 26-39. Respondent responds largely with a non-sequitur: that this Court has consistently refused to recognize any constitutional right to peremptory challenges. But, contrary to respondent's repeated suggestion, Resp. Br. 28, 30, 31, 35-36, petitioner's argument does not depend on this Court recognizing any such constitutional right, as his brief made clear. Pet. Br. 38.

Petitioner has argued that peremptory challenges have consistently throughout our history played an important part in preserving the undoubted constitutional right to an impartial jury, even without themselves being a constitutional right. That is precisely what this Court has said on numerous occasions. *Id.* at 30 (citing cases). By choosing to provide peremptory challenges, a state involves the defendant in the process of ensuring a fair trial before an impartial jury. Having made that choice, the state cannot arbitrarily override the defendant's participation in that process without introducing an unacceptable risk of bias.

Respondent asserts that the "likelihood or appearance of bias" in a jury violates neither due process nor warrants automatic reversal. Resp. Br. 32. But this Court was clear in *Peters*: such a "likelihood" could violate the Due Process Clause "even if there is no showing of actual bias in the tribunal." 407 U.S. at 502. The defendant's interest in the impartiality of the adjudicator is sufficiently strong that it requires protection not only against its proven violation, but also against circumstances in which the violation can reasonably be asserted, even

if not proven. That is why in *Turner* v. *Louisiana*, 379 U.S. 466, 473-74 (1965), this Court automatically reversed a conviction issued by a jury that had been sequestered with two deputies who were key prosecution witnesses. It was not important to establish that the witnesses had discussed the case with the jurors; the reasonable possibility that they had was sufficient to violate due process and require a new trial.

The denial of petitioner's right to strike Ms. Gomez raises a sufficient concern about the partiality of petitioner's jury to warrant automatic reversal. Respondent disparages the traditional, well-recognized use of peremptory challenges to root out juror bias that the necessarily imperfect system of for-cause challenges will not catch. Resp. Br. 34-35; see Pet. Br. 29-34. That the right to strike a juror peremptorily might be employed for less noble reasons does not change its frequent and proper use. More importantly, if Illinois or any other state believes that peremptory challenges do not helpfully advance the cause of administering a fair and impartial criminal jury system, one would expect to see them abolished. But no state has done so.

Ultimately, this case involves the deprivation of a state-law right that has an unbroken tradition of acceptance in Illinois and the nation, and that this Court has repeatedly recognized plays an important role in ensuring the right to a fair and impartial jury. The unique status of this state-law right and its role in preserving a federal constitutional right mean that its arbitrary deprivation violates the Due Process Clause. In *Evitts*, this Court recognized that there is no constitutional right to a direct criminal appeal. "Nonetheless, if a State has created appellate courts ... the procedures used in deciding appeals

must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." 469 U.S. at 393 (citations omitted). Likewise, when a state grants the defendant the power to participate in the selection of those who adjudicate guilt, the arbitrary denial of that power offends due process. See *id.* at 400-01 ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of ... the Due Process Clause."). Just as this Court's ruling in *Evitts* did not create a constitutional right to a criminal appeal, or lead to the "federalization" of countless state rules of criminal procedure, so too a ruling here that the wrongful denial of petitioner's peremptory strike violates due process will not create a constitutional right to peremptory challenges or lead to the "federalization" of other state procedural rules.

Finally, respondent is wrong to assert that petitioner's due process rights were satisfied by *erroneous* appellate review of his claim. Resp. Br. 41-42. In *Hicks*, the petitioner had the opportunity to present his claim to the Oklahoma appellate courts, but they provided no relief. 447 U.S. at 345 & n.2. Likewise, here petitioner has consistently insisted on his state law rights, and has been consistently denied them. Just as *Hicks* was denied due process, so was petitioner.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

ROBERT N. HOCHMAN
AARON S. MANDEL
JEREMY G. MALLORY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

February 12, 2009

AMICUS CURIAE BRIEF

No. 07-9995

OCT 21 2008

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL RIVERA
Petitioner,

vs.

THE STATE OF ILLINOIS
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

KYM L. WORTHY
Wayne County Prosecuting Attorney

*TIMOTHY A. BAUGHMAN (P 24381)**
Chief of Research, Training and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

* Counsel of Record

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Assuming, for the sake of argument, that a defense-initiated peremptory challenge was erroneously denied, does that denial standing alone violate any federal constitutional right of the accused, or is the constitution only implicated on the seating of a juror who is not impartial?

TABLE OF CONTENTS

PAGE

Index of Authorities ..... -3-

Statement of Questions Presented for Review .. -1-

Interest of the Amicus ..... -5-

Argument ..... -6-

Conclusion ..... -23-

INDEX OF AUTHORITIES

CASE PAGE

Federal Cases

Aki-Khuam, v Davis
339 F3d 421 (CA 7, 2003).....13

Batson v Kentucky,
476 US 79, 106 S Ct 1712,
90 L Ed 2d 69 (1986).....17

Bills v Henderson,
631 F2d 1287 (CA 6, 1080.....12

Georgia v McCollum,
505 US 42, 112 S Ct 2348,
120 L Ed 2d 33 (1992).....17

Johnson v United States,
520 US 461, 117 S Ct 1544,
137 L Ed 2d 718 (1997).....19

McDonough Power Equipment v Greenwood,
464 US 548, 104 S Ct 845,
78 L Ed 2d 663 (1984).....10

Neder v United States,
527 US 1, 119 S Ct 1827,
144 L Ed 2d 35 (1999).....21

Powers v Ohio, 499 US 400, 111 S Ct 1364,
113 L.Ed 2d 411 (1991).....17

Shango v Jurich,
681 F2d 1091 (CA 7, 1982).....22

United States v Annigoni,
96 F3d 1132 (CA 9, 1996).....18

United States v Harbin,
250 F3d 532 (CA 7, 2001).....20

United States v Jackson,
2001 WL 388852 (S.D. Ind., 2001).....15

United States v Martinez-Salazar,
528 US 311, 120 S Ct 774,
145 L Ed 2d 792 (2000) 7

United States v McFerron,
163 F3d 952 (CA 6, 1998).....19

United States v Patterson,
215 F.3d 776 (CA 7, 2000).....9, passim

United States v Underwood,
122 F3d 389 (CA 7, 1997)..... 15

United States v Wilson,
355 F3d 358 (CA 5, 2003).....20

Watson v City of New York,
92 F3d 31 (CA 2, 1996).....22

State Cases

Commonwealth v Carson,
741 A2d 686 (Pa, 1999).....23

People v Bell,
473 Mich 275, 702 NW2d 128 (Mich, 2005).....23

Whitney v State,
l L158 Md App 519,
857 A2d 625 (Md App, 2004).....23

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

The Denial Of A Peremptory Challenge Is Not Constitutional Error, Unless That Denial Itself Constitutes Invidious Discrimination Against the Accused

A. Introduction

The essence of the error of the petitioner's position is revealed in the statement in petitioner's reply brief on the petition for certiorari that "*if* a state grants the parties the right to exercise peremptory challenges, the erroneous denial of that right violates petitioner's constitutional rights to due process *and an impartial jury* when it results in the seating of a juror *who should have been excused*" (first emphasis in the original, second and third emphasis added). This conflates the constitutional right to an impartial jury with the state statutory right to excuse a limited number of jurors *without* any demonstration of lack of impartiality—a conflation necessary to petitioner's argument and leaves hanging a critical question. When petitioner says that the erroneous denial of a peremptory challenge results in the seating of a juror "who should have been excused" the question that is critical is *on what basis* should the juror have been excused? If the answer is simply because the peremptory challenge was authorized and not exercised in a constitutionally prohibited discriminatory manner, then seating the juror does not result in a violation of the constitutional right to an impartial juror. If the answer is that the questioning revealed that the juror was *not* impartial, then the peremptory challenge claim disappears, for the claim then is that the accused was denied a proper challenge for cause and was tried by a juror who was not impartial. Petitioner's argument devolves to a claim that the erroneous

denial of any peremptory challenge which necessarily would include even a simple "miscount" by the trial judge of the number of challenges remaining available is the denial of the right to an impartial jury. This is a *non sequitur.*

B. No Constitutional Right Is Involved Here

One criminally accused has a right under the federal[1] constitution to trial by an impartial jury. Challenges for cause are designed to secure this right; persons who may be biased by circumstances, such as relationship to a party, and those expressing a bias, are disqualified from service. Peremptory challenges, on the other hand, though possessing a venerable pedigree, are nonetheless auxiliary to the challenge for cause. "Unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. ...('There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges')."[2] Even before the decision in *Martinez-Salazar,* this Court considered the situation where defense counsel is required to expend a peremptory challenge to remove a juror who should have been removed on counsel's challenge for cause:

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But *we reject the notion that the loss of a peremptory*

1. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." United States Const., Amend. VI.

2. *United States v Martinez-Salazar,* 528 US 304, 311, 120 S Ct 774, 779, 145 L Ed 2d 792 (2000).

> *challenge constitutes a violation of the constitutional right to an impartial jury.* We have long recognized that peremptory challenges are not of constitutional dimension....They are a means to achieve the end of an impartial jury. *So long as the jury that sits is impartial*, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.[3]

Ross, then, rather clearly rejects petitioner's argument that the seating of a juror not shown to be partial because of the erroneous denial of a peremptory challenge is not only constitutional error, but "structural," causing automatic reversal of any conviction. The constitutional question is whether the jury that sat was impartial, and that issue has never been controverted in these proceedings, defendant insisting that the compromising of a state-granted right to exclude an impartial juror amounts to federal constitutional harm that is reversible without regard to any prejudice.[4]

3. *Ross v Oklahoma*, 487 US 81, 88, 108 S Ct 2273, 2278, 101 L Ed 2d 80 (1988) (emphasis supplied).

4. Though no court has so found here (or anywhere, that amicus is aware of), petitioner might argue that the simple fact that the juror was aware the his counsel attempted to remove the juror renders the juror partial. But in any case where a "reverse-Batson" challenge is upheld—and upheld properly the juror will know that the accused attempted to excuse him or her. The law is not so absurd that an accused can *achieve* a constitutionally prohibited strike (one based on

The point has been nicely stated by an illustrious panel of the seventh circuit court of appeals in *United States v Patterson*.[5] Because of a complicated calculation error in the determination of peremptory challenges, defendant was denied several peremptory challenges, receiving fewer than provided by statute. He claimed that this error required reversal without consideration of the question of prejudice. Writing for himself and Judges Posner and Wood, Judge Easterbrook disagreed:

> - Defendants respond that an error concerning a peremptory challenge always affects a "substantial" right. *A right is "substantial" when it is one of the pillars of a fair trial.*
>
> - Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a "substantial" right even if it were certain that a jury would convict. ...
>
> - For the same reason, a biased tribunal always deprives the accused of a substantial right....Deprivation of counsel likewise so undermines the ability to distinguish the guilty from the

invidious discrimination) by the simple fact of making it, which perforce taints the juror. Petitioner cannot prevail on *this* basis.

5. *United States v Patterson*, 215 F3d 776 (CA 7, 2000), vacated in part on other grounds, 531 US 1033, 131 S Ct 621, 148 L Ed 2d 531 (2000).

innocent that it always leads to reversal....

- But "if the defendant had counsel and *was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." It is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge.*

- When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the *substantial* right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries.[6]

6. *United States v Patterson*, 215 F3d 776, 781 (CA 7, 2000), vacated in part on other grounds, 531 US 1033, 131 S Ct 621, 148 L Ed 2d 531 (2000)(all but the final emphasis supplied, citations omitted). Note also that with regard to application of the statutory requirement that reversal not occur unless a substantial right was impaired the panel pointed to this Court's decision in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), where a juror's failure to respond to a question on voir dire deprived a party of information that would have been useful in exercising a peremptory challenge. The court observed that "the Court concluded that

The only error for consideration in *Patterson*, then, was non-constitutional, and one not requiring reversal since the "substantial right" involved, the right to an impartial jury, was not compromised by the statutory error. Where a state conviction is involved, a conclusion that no constitutional error is involved *ends the inquiry*. What the federal system decides is appropriate if there is a violation of federal statute with regard to peremptory challenges—indeed, whether there is or is not a split of authority on that question is of no moment. Consideration of whether any error of *state law* that occurred is "harmless beyond a reasonable doubt" or "structural" has no place in a federal court. If the error here, then, was not constitutional, the matter simply is at a close.

A distinction has sometimes been drawn between the "dilution" of the statutory number of peremptory challenges and the "denial" of the exercise of a peremptory challenge. A dilution occurs when a challenge for cause is denied improperly, and the defendant is forced to employ a peremptory challenge to excuse the juror. After *Martinez-Salazar* it is clear that in either circumstance no constitutional error has occurred. Error can only occur if the improper denial of the challenge for cause

reversal would not be justified unless a correct response by the juror 'would have provided a valid basis for a challenge for cause.' ... The Court recognized the importance of information to the intelligent exercise of peremptory challenges but concluded that '[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.'"

occurs after all peremptory challenges are exhausted, for then the claim is a constitutional one, that is, that the Sixth Amendment right itself has been violated, as a juror who was *not impartial* sat. A denial of an exercise of a peremptory challenge occurs either, as in this case, by the refusal by the trial court to allow a strike to be made, or by a miscount, so that the defendant is permitted to exercise fewer challenges than permitted under the applicable statute or court rule. The error in *Patterson* was a *denial* of the complete complement of peremptory challenges through a miscount. If a defendant must exercise a peremptory challenge to excuse a juror who should have been excused on his or her challenge for cause, if a defendant is given his or her full complement of peremptory challenges but is improperly denied the exercise of a challenge as to a particular juror, or if a defendant is denied the exercise of his or her full complement of challenges because of a miscount or computational error, as in *Patterson*, so long as the jury that sits is impartial, no federal constitutional violation of any sort has occurred.

Though there is some authority for the proposition that the erroneous denial of a peremptory challenge is constitutional error, that authority is at best superficial in its reasoning, and at worst casual, failing to understand that not every deviation from required state procedures can "be viewed as a federal constitutional violation," for such a doctrine would "make a large volume of state...judicial proceedings subject to complaint in the federal courts on due process grounds,"[7] converting ordinary claims of violation of state procedural requirements into

7. See e.g. *Bills v Henderson*, 631 F2d 1287, 1298 (CA 6, 1980).

constitutional claims. An example is *Aki-Khuam v Davis*.[8]

The trial judge in *Aki-Khuam*–a death-penalty case– required *more* than a race-neutral reason to justify the challenges:

> ...the trial court rejected Petitioner's race-neutral explanations not because they demonstrated a discriminatory motive, but rather because the trial court found the reasons, "terrible,"unsupported in the record, based on a prospective juror's response to a "trick question," or due to defense counsel's introduction of the work "slickster."[9]

But the conclusion of the court that the misapplication of *Batson* and its progeny was both constitutional and reversible error is at once superficially reasoned and internally inconsistent. The panel stated its *ipse dixit* that the error violated the accused's "due process and equal protection rights" by depriving him of "his statutory right to exercise peremptory challenges" for any reason other than a discriminatory one. Though there was neither a claim nor a finding that the jury was not impartial, the panel found that because the jury was created in a manner that violated statutory requirements by denying an arguably race-neutral peremptory challenge, the constitution was violated. Why this violation of state law constituted constitutional error was never explained, and reversal followed,

8. *Aki-Khuam v Davis*, 339 F3d 521 (CA 7, 2003). The opinion, somewhat curiously, arises from the same circuit as *Patterson* though *Patterson* is not mentioned in the opinion.

9. 339 F3d at 527.

apparently automatically, though the panel never denominated the error as "structural" or in any way discussed prejudice –except in a footnote, where, in outlining that which it was *not* saying, the panel contradicted its failure to discuss principles of prejudice and harmless error.[10] And it is in this footnote that the panel's entire harmless-error analysis appears: the error "was not harmless."[11]

The unreasoned conclusions reached in *Aki-Khuam*[12] cannot be squared with the reasoned analysis of *Patterson* that where the defendant was

10. "We are careful to note that today's decision...should not be read to hold that (i)the Constitution provides a per se right to peremptory challenges, (ii) the Constitution per se requires states to adhere to their own rules of trial procedure, or (iii) the harmless-error doctrine is inapplicable." 339 F3d at 529, fn 6.

11. 339 F3d at 529, fn 6.

12. The panel's conclusion that the state could not provide greater protections for jurors than mandated by *Batson* is also fundamentally mistaken. So long as applied equally to both prosecution and defense, there is absolutely no constitutional impediment to the state creation of a peremptory challenge system that contains different methods than required by the constitution for establishing a prima facie case of discrimination, different allocations of the burden of proof, or even that establishes a "quasi-challenge for cause" as a required justification for a strike, if the state chooses to create such a system (or to abolish the peremptory challenge altogether), whether the protection of the prospective juror is established under the state constitution or state statute.

"tried by an impartial adjudicator" there is no constitutional error, and there is a strong presumption that any statutory errors that may have occurred are subject to harmless-error analysis, for "[I]t is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the substantial right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries."[13] In other words, peremptory challenges exist to assist in the empaneling of an impartial jury, which is the substantial right enjoyed by the accused; where error occurs in the exercise of peremptory challenges that does not somehow cause the seating of a partial jury, that error is not constitutional.

Also well making the point, and presaging *Patterson*, is the discussion of Judge Easterbrook dissenting from the denial of rehearing en banc in *United States v Underwood*,[14] a case recognized as of no force after *Martinez-Salazar*.[15] The panel reversed

13. *Patterson*, at 781.

14. *United States v Underwood*, 130 F3d 1225 (CA 7, 1997).

15. The panel decision is found at *United States v Underwood*, 122 F3d 389 (CA 7, 1997); see *United States v Jackson*, 2001 WL 388852, 2 (S.D.Ind.,2001): "The bottom line is that *Underwood's* discussion of the need for a clear understanding of the peremptory challenge process remains good law, but the automatic reversal

because of a confusion in the jury-selection process that prevented defense counsel from making "the most advantageous use of their peremptory challenges." The panel did not find that the error was prejudicial under the federal statute precluding relief unless the error affects a substantial right, but believed reversal required by the dicta in *Swain v Alabama,* since repudiated in *Martinez-Salazar*, as noted previously. Anticipating *Martinez-Salazar* by almost three years, Judge Easterbrook for himself and Judges Posner, Manion, and Evans, noted that "[P]erfection is elusive" and in review of trials for error "the quest for the perfect is the enemy of the good."[16] The panel, said Judge Easterbrook, had no authority to reverse without applying FRCP 52(a), providing that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," for the rule (which in the federal system is passed by Congress and is thus in effect a statute) "does not except errors affecting peremptory challenges. *Any* error that does not affect substantial rights *shall* be disregarded."[17] Of course, when a state conviction is involved, application of federal statutes concerning harmless error is inappropriate; the first question is whether a constitutional error occurred, and the question of harmless error is never reached if no constitutional error is found. None occurred here.

It is appropriate to recall the basis of *Batson* and its progeny. It is the right of the juror to serve which is protected, with both the defendant and the prosecutor given third-party standing to assert the

standard is no longer applicable."

16. 130 F3d at 1227.

17. 130 F3d at 1227.

constitutional rights of the juror.[18] If a juror is "overprotected" by a state trial judge who disallows a permissible defense peremptory challenge, the accused is not aggrieved (nor is the juror, so as to even theoretically give the accused third-party standing to litigate the juror's rights on appeal). The accused is only aggrieved if the juror is not impartial; again, the seating of a partial juror is an independent claim, not involved in this case.[19]

C. Erroneous Denial Of A Peremptory Challenge is Not Structural Error In Any event.

Again, the "structural or subject to harmless-error" review question should not be considered here, for there is no constitutional error to review. But if somehow the error is viewed as

18. See *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Georgia v McCollum,* 505 U.S. 42, 49, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

19. There is, amicus believes, one other possibility, not involved here. That is, if a trial judge were to deny the exercise of a peremptory challenge with the denial itself based on invidious discrimination —for example, stating that some ethic or racial group is not allowed the full complement of challenges permitted by state law then the denial of the state right on an invidious criteria would be unconstitutional, for even a right or privilege created by state law cannot be denied based on an invidious classification. Since the jury that sat would nonetheless be impartial, *that* situation might raise the "structural or subject to harmless-error review" question, but amicus has never heard of a judge behaving in such a manner.

constitutional—though it simply cannot viewed as the denial of the right to an impartial jury—then it cannot be considered as "structural" error. The holding of the Ninth Circuit in *United States v Annigoni*,[20] a pre-*Martinez-Salazar* case, to the contrary, is mistaken.

In *Salazar* the trial court disallowed a peremptory challenge on *Batson* grounds without finding that the strike was racially motivated. The majority of the court found that it was not bound to apply FRCP 52(a) because automatic reversal for denial of a peremptory challenge was a rule of "long standing," and the error is not susceptible to "quantitative assessment" in the "context of other evidence presented" in order to determine whether it was harmless. Judge Kozinski in dissent concluded that, on the contrary, because the error in the denial of the peremptory challenge does not affect the substantial right afforded by the constitution –an impartial jury– "I find it hard to believe that the [Supreme] Court would now conclude that it's always reversible error to deny a defendant a mere statutory right."[21]

20. *United States v Annigoni* (en banc), 96 F3d 1132 (CA 9, 1996).

21. 96 F3d at 1150. As Judge Kozinski observed, "we are forced to choose from two all-or-nothing rules: the error is *always* harmless or it is *never* harmless. There is no practical middle ground. Given this choice, I believe the Supreme Court would conclude that this kind of error is always harmless."

That Judge Kozinski was correct and *Annigoni* and like cases[22] wrong (meaning the entire inquiry is mooted with regard to state convictions, there being no constitutional error) is demonstrated by the later case from this Court in *Johnson v United States.*[23] There ths Court firmly rejected a claim that Rule 52(a) did not apply because the error complained of was "structural":

> Petitioner agues that ... the error she complains of here is "structural," and is outside Rule 52(b) altogether. *But the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure.*
>
> ***
>
> We [have] cautioned against any unwarranted expansion of Rule 52(b)...because it "would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed"....Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, *an exception which we have no authority to make.*[24]

22. See e.g. *United States v McFerron*, 163 F3d 952 (CA 6, 1998).

23. *Johnson v United States*, 520 US 461, 117 S Ct 1544, 137 L Ed 2d 718 (1997).

24. 520 US at 466, 117 S Ct at 1548 (emphasis supplied).

The remaining argument is that application of a harmless-error rule such as Rule 52(b), or even the "harmless beyond a reasonable doubt" test for constitutional error, should always lead to the conclusion that the erroneous preclusion of a peremptory challenge is reversible (essentially, a claim of structural error in different guise). But one returns to Judge Easterbrook's reasoning: the substantial right involved is the right to an impartial jury; "[A]fter *McCollum* and *Ross* it is impossible to ground an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. If the jury that actually sits is impartial, the defendant has enjoyed the *substantial* right."[25] Were it otherwise even the legislature could not alter the number of peremptory challenges, or abolish them, which is to give them constitutional status though the law is clear that they are a statutory creation.[26]

25. 130 F3d at 1229. Judge Easterbrook in *Patterson* allowed that it was possible that a jury-selection process could become so confused as to affect a substantial right; in *United States v Harbin*, 250 F3d 532 (CA 7, 2001) the panel so found, because not only was the process confused, but the prosecution, and the prosecution alone, was permitted to exercise a peremptory challenge *during trial*. The panel concluded that allowing the prosecution unilaterally to use a "pre-trial jury selection tool to alter the composition of the jury mid-trial" affected substantial rights. Cf. *United States v Wilson*, 355 F3d 358 (CA 5, 2003), where no error was found under *Harbin* because both parties had this opportunity to exercise a peremptory challenge at the conclusion of trial.

26. Note that in *Johnson* the trial court had failed to submit an *element* of the crime to the jury for determination beyond a reasonable doubt, as at

D. Conclusion

An accused has a substantial right –a constitutional right– to trial before an impartial jury. Should a challenge for cause be denied erroneously, when, because all peremptory challenges have been used, there is no opportunity for counsel to excuse that juror, then the error in procedure causes a loss of the substantive right. But it must always be remembered that "[P]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[27] Where it is possible, as it generally is, for a procedural error to occur without working the violation of a substantial right, let alone a constitutional right, then a conviction should not be upset. For example, arraignment is a procedure that protects a liberty interest freedom from confinement but that procedure may be violated in some ways, including not being sufficiently "prompt"

that time it was believed in the federal system that materiality in a perjury case was the for court not the jury, and this Court found that the error was subject to plain-error review. Similarly, the Court in *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999) held that this error was also subject to harmless-error review under Rule 52(b) where the error was preserved. It is difficult to escape the conclusion that if an error in the failure to submit an element of the offense to the jury is capable of harmless-error review, then an error in the exercise of peremptory challenges that does not result in a partial jury is also capable of harmless-error review.

27. *Olim v. Wakinekona*, 461 US 238, 250, 103 S Ct 1741, 75 L Ed 2d 813 (1983).

under *state* law, without violating the federal constitutional interest involved.[28]

> As cogently put by one federal decision,
>
> Constitutionalizing every state procedural right would stand any due process analysis on its head. Instead of identifying the substantive interest at stake and then ascertaining what process is due to the individual before he can be deprived of that interest, *the process is viewed as a substantive end in itself.* The purpose of a procedural safeguard, however, is the *protection* of a substantive interest to which the individual has a legitimate claim of entitlement.[29]

Here, because the jury that sat cannot be said to have been partial, any error in maintaining the juror on the jury did not violate the substantive right involved –the right to an impartial jury.[30]

28. See *Watson v City of New York*, 92 F3d 31, 38 (CA 2, 1996), affirming dismissal of civil rights claim based on violation of New York arraignment procedure, finding that the plaintiff's federal constitutional claim was erroneously premised on the proposition that a state law construction of the state arraignment statute itself created a liberty interest protected by the Fourteenth Amendment.

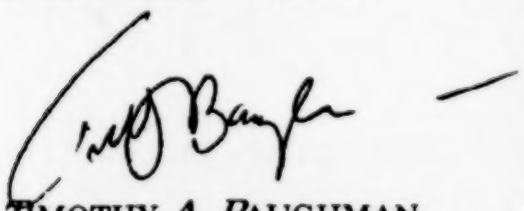
29. *Shango v. Jurich*, 681 F2d 1091, 101 (CA 7, 1982).

29. And see, so holding, *People v Bell*, 473 Mich. 275, 702 N.W.2d 128 (Mich, 2005); *Whitney v State*, 158 Md.App. 519, 857 A.2d 625 (Md App, 2004); *Commonwealth v Carson*, 741 A.2d 686 (PA, 1999).

Conclusion

WHEREFORE, this Court should affirm the Illinois Supreme Court.

KYM L. WORTHY
Wayne County
Prosecuting Attorney



TIMOTHY *A. B*AUGHMAN
Chief of Research, Training, & Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Phone: 313-224-5792

JOINT APPENDIX

120

(14)

No. 07-9995

Supreme Court, U.S.
DEC 5 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Illinois

JOINT APPENDIX

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

ROBERT N. HOCHMAN
AARON S. MANDEL
JEREMY G. MALLORY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312)853-7000

Counsel for Petitioner

LISA MADIGAN
ATTORNEY GENERAL OF ILLINOIS
100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3000

ALAN J. SPELLBERG*
ASSISTANT STATE'S ATTORNEY
309 Richard J. Daley Ctr.
50 West Washington Street
Chicago, IL 60602
(312) 603-5496

Counsel for Respondent

* Counsel of Record
[Additional Counsel Listed On Inside Cover]

December 5, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002
PETITION FOR CERTIORARI FILED FEBRUARY 27, 2008
CERTIORARI GRANTED OCTOBER 1, 2008

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

ANITA ALVAREZ
COOK COUNTY STATE'S
ATTORNEY
JAMES E. FITZGERALD
JUDY L. DEANGELIS
ASSISTANT STATE'S
ATTORNEYS
309 Richard J. Daley
Center
50 West Washington
Street
Chicago, IL 60602
(312) 603-5496

Counsel for Respondent

TABLE OF CONTENTS

	Page
Circuit Court of Cook County, Illinois, Docket Entries	1
Transcript of Jury Trial, *People v. Rivera*, No. 98 CR 3865 (Cir. Ct. of Cook County, Ill. Aug, 7, 2000) (excerpts)	28
Motion for New Trial, Motion to Arrest Judgment, *People v. Rivera*, No. 98 CR 3865 (Cir. Ct. of Cook County, Ill. Sept. 8, 2000)	42
Transcript of Hearing, *People v. Rivera*, No. 98 CR 3865 (Cir. Ct. of Cook County, Ill. Sept. 8, 2000) (excerpt)	46
People v. Rivera, No. 98 CR 3865 (Cir. Ct. of Cook County, Ill. Sept. 8, 2000) (order of commitment and sentence)	61
People v. Rivera, No. 98 CR 3865 (Cir. Ct. of Cook County, Ill. Nov. 8, 2000) (order of commitment and sentence)	62
People v. Rivera, 810 N.E.2d 129 (Ill. App. Ct. 2004)	63
People v. Rivera, 852 N.E.2d 771 (Ill. 2006).	94
Transcript of Hearing, *People v. Rivera*, No. 98 CR 3865 (Cir. Ct. of Cook County, Ill. Nov. 15, 2006)	134
People v. Rivera, 879 N.E.2d 876 (Ill. 2007).	144

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

Number 98 CR 0386501

THE PEOPLE OF THE STATE OF ILLINOIS,

vs.

MICHAEL RIVERA.

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

Charging the above named defendant with:

720-5/9-1(A)(1) F MURDER/INTENT TO KILL/INJ

720-5/9-1(A)(2) F MURDER/STRONG PROB KILL/I

The following disposition(s) was/were rendered before the Honorable Judge(s):

DATE	PROCEEDINGS		
01/28/98	Ind/info-clk office- pres judge 98CR0386501 ID# CR100101091	02/10/98	1701
02/10/98	Case assigned Fitzgerald, Thomas R.	02/10/98	1727
02/10/98	Defendant in custody Fiala Jr., Edward M.		
02/10/98	Prisoner data sheet to issue Fiala Jr., Edward M.		
02/10/98	Public defender appointed Fiala Jr., Edward M.		
02/10/98	Defendant not arraigned Fiala Jr., Edward M.		
02/10/98	Continuance by agreement Fiala Jr., Edward M.	02/20/98	
02/20/98	Defendant in custody Fiala Jr., Edward M.		
02/20/98	Prisoner data sheet to issue Fiala Jr., Edward M.		
02/20/98	Defendant arraigned Fiala Jr., Edward M.		

DATE	PROCEEDINGS	
02/20/98	Plea of not guilty Fiala Jr., Edward M.	
02/20/98	Admonish as to trial in absent Fiala Jr., Edward M.	
02/20/98	Pretrial disc order entered Fiala Jr., Edward M.	
02/20/98	Continuance by agreement Fiala Jr., Edward M.	03/23/98
03/23/98	Defendant in custody Fiala Jr., Edward M.	
03/23/98	Prisoner data sheet to issue Fiala Jr., Edward M.	
03/23/98	Pretrial disc order entered Fiala Jr., Edward M.	
03/23/98	Continuance by agreement Fiala Jr., Edward M.	04/22/98
04/22/98	Defendant in custody Fiala Jr., Edward M.	
04/22/98	Prisoner data sheet to issue Fiala Jr., Edward M.	

DATE	PROCEEDINGS	
04/22/98	Pretrial disc order entered Fiala Jr., Edward M.	
04/22/98	Continuance by agreement Fiala Jr., Edward M.	05/28/98
05/28/98	Defendant in custody Linn James B.	
05/28/98	Prisoner data sheet to issue Linn James B.	
05/28/98	Continuance by agreement Linn James B.	06/30/98
06/30/98	Defendant in custody Fiala Jr., Edward M.	
06/30/98	Prisoner data sheet to issue Fiala Jr., Edward M.	
06/30/98	Continuance by agreement Fiala Jr., Edward M.	07/22/98
07/22/98	Defendant in custody Fiala Jr., Edward M.	
07/22/98	Prisoner data sheet to issue Fiala Jr., Edward M.	

DATE	PROCEEDINGS	
07/22/98	Continuance by agreement Fiala Jr., Edward M.	09/02/98
09/02/98	Defendant in custody Fiala Jr., Edward M.	
09/02/98	Prisoner data sheet to issue Fiala Jr., Edward M.	
09/02/98	Change priority status R Fiala Jr., Edward M.	
09/02/98	Continuance by agreement Fiala Jr., Edward M.	10/08/98
10/08/98	Defendant in custody Fiala Jr., Edward M.	
10/08/98	Prisoner data sheet to issue Fiala Jr., Edward M.	
10/08/98	Continuance by agreement Fiala Jr., Edward M.	10/23/98
10/23/98	Defendant in custody Fiala Jr., Edward M.	
10/23/98	Witnesses ordered to appear Fiala Jr.. Edward M.	

DATE	PROCEEDINGS	
10/23/98	Continuance by agreement Fiala Jr., Edward M.	12/14/98
12/14/98	Defendant in custody Fiala Jr., Edward M.	
12/14/98	Prisoner data sheet to issue Fiala Jr., Edward M.	
12/14/98	Continuance by agreement Fiala Jr., Edward M.	12/15/98
12/15/98	Defendant in custody Fiala Jr., Edward M.	
12/15/98	Prisoner data sheet to issue Fiala Jr., Edward M.	
12/15/98	Continuance by agreement Fiala Jr., Edward M.	01/06/99
01/06/99	Defendant in custody Fiala Jr., Edward M.	
01/06/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
01/06/99	Continuance by agreement Fiala Jr., Edward M.	03/22/99

DATE	PROCEEDINGS	
03/22/99	Defendant in custody Fiala Jr., Edward M.	
03/22/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
03/22/99	Continuance by agreement Fiala Jr., Edward M.	06/01/99
06/01/99	Defendant in custody Fiala Jr., Edward M.	
06/01/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
06/01/99	Continuance by agreement Fiala Jr., Edward M.	06/28/99
06/28/99	Defendant in custody Fiala Jr., Edward M.	
06/28/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
06/28/99	Continuance by agreement Fiala Jr., Edward M.	09/20/99
09/20/99	Defendant in custody Fiala Jr., Edward M.	

DATE	PROCEEDINGS	
09/20/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
09/20/99	Continuance by agreement Fiala Jr., Edward M.	09/21/99
09/21/99	Defendant in custody Fiala Jr., Edward M.	
09/21/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
09/21/99	Continuance by order of court Fiala Jr., Edward M.	10/07/99
10/07/99	Defendant in custody Fiala Jr., Edward M.	
10/07/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
10/07/99	Appearance filed Fiala Jr., Edward M.	
10/07/99	Continuance by agreement Fiala Jr., Edward M.	11/18/99
11/18/99	Defendant in custody Fiala Jr., Edward M.	

DATE	PROCEEDINGS	
11/18/99	Prisoner data sheet to issue Fiala Jr., Edward M.	
11/18/99	Appearance filed Fiala Jr., Edward M.	
11/18/99	Continuance by agreement Fiala Jr., Edward M.	12/22/99
12/03/99	Trans proc rec/filed clks off	00/00/00
12/07/99	Reprt/procds recd by app attry State Appellate Defender	00/00/00
12/21/99	Supp tran pro rec/file clk off	00/00/00
12/22/99	Defendant in custody Fiala Jr., Edward M.	00/00/00
12/22/99	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
12/22/99	Continuance by agreement Fiala Jr., Edward M.	01/25/00
01/25/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
01/25/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00

DATE	PROCEEDINGS	
01/25/00	Witnesses ordered to appear Fiala Jr., Edward M.	00/00/00
01/25/00	Continuance by agreement Fiala Jr., Edward M.	02/02/00
02/02/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
02/02/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
02/02/00	Witnesses ordered to appear Fiala Jr., Edward M.	00/00/00
02/02/00	Continuance by agreement Fiala Jr., Edward M.	04/14/00
02/16/00	Rept of prcds ord fr crt rpt	00/00/00
04/14/00	Defendant in custody Cohen, Kenneth J.	00/00/00
04/14/00	Prisoner data sheet to issue Cohen, Kenneth J.	00/00/00
04/14/00	Change priority status R Cohen, Kenneth J.	00/00/00

DATE	PROCEEDINGS	
04/14/00	Witnesses ordered to appear Cohen, Kenneth J.	
04/14/00	Continuance by agreement Cohen, Kenneth J.	05/04/00
05/04/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
05/04/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
05/04/00	Special order b/a 07-17-00 w/s jury Fiala Jr., Edward M.	00/00/00
05/04/00	Continuance by agreement Fiala Jr., Edward M.	05/19/00
05/04/00	Change priority R status Fiala Jr., Edward M.	00/00/00
05/19/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
05/19/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
05/19/00	Continuance by agreement Fiala Jr., Edward M.	05/31/00

DATE	PROCEEDINGS	
05/31/00	Defendant in custody Bowie, Jr., Preston L.	00/00/00
05/31/00	Prisoner data sheet to issue Bowie, Jr., Preston L.	00/00/00
05/31/00	Continuance by agreement Bowie, Jr., Preston L.	06/05/00
06/05/00	Defendant in custody Lacy, William G.	00/00/00
06/05/00	Prisoner data sheet to issue Lacy, William G.	00/00/00
06/05/00	Continuance by agreement Lacy, William G.	06/12/00
06/12/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
06/12/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
06/12/00	Witnesses ordered to appear Fiala Jr., Edward M.	00/00/00
06/12/00	Motion deft - continuance - md Fiala Jr., Edward M.	06/21/00

DATE	PROCEEDINGS	
06/21/00	Special order Ops records impounded Hogan, Michael J.	00/00/00
06/21/00	Case advanced Hogan, Michael J.	07/17/00
06/21/00	Continuance by agreement Hogan, Michael J.	07/13/00
07/13/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
07/13/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
07/13/00	Witnesses ordered to appear Fiala Jr., Edward M.	00/00/00
07/13/00	Change priority status R Fiala Jr., Edward M.	00/00/00
07/13/00	Continuance by agreement Fiala Jr., Edward M.	08/07/00
08/07/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
08/07/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00

DATE	PROCEEDINGS	
08/07/00	Trial comenced and continued Fiala Jr., Edward M.	08/08/00
08/08/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
08/08/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
08/08/00	Trial comenced and continued Fiala Jr., Edward M.	08/09/00
08/09/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
08/09/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
08/09/00	Trial comenced and continued Fiala Jr. , Edward M.	08/10/00
08/10/00	Defendant in custody Fiala Jr., Edward M.	00/00/00
08/10/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00
08/10/00	Special order Atty. Decker both sides closed Fiala Jr., Edward M.	00/00/00

DATE	PROCEEDINGS				
08/10/00	Verdict of guilty Fiala Jr., Edward M.	CALL	00/00/00		
08/10/00	Bail revoked Fiala Jr., Edward M.		00/00/00		
08/10/00	Special order Evidence impounded Fiala Jr., Edward M.		00/00/00		
08/10/00	Pre-sent invest. Ord, contd to Fiala Jr., Edward M.				
08/10/00	Continuance by agreement Fiala Jr., Edward M.		09/08/00		
08/29/00	Suppl report of prcd prepared		00/00/00		
09/08/00	Defendant in custody Fiala Jr., Edward M.		00/00/00		—
09/08/00	Prisoner data sheet to issue Fiala Jr., Edward M.		00/00/00		
09/08/00	Motion defendant - new trial Arrest judgement denied Fiala Jr., Edward M.		00/00/00	D	2
09/08/00	Lesser included offense merged Count 1 merged in count 2 Fiala Jr., Edward M.	C002	00/00/00		

DATE	PROCEEDINGS			
09/08/00	Def sentenced Illinois doc Defendant sent. extended term. 85 Yrs Fiala Jr., Edward M.	C002	00/00/00	
09/08/00	Credit defendant for time serv 970 Dys Fiala Jr., Edward M.		00/00/00	
09/08/00	Special order Psi of record Fiala Jr., Edward M.		00/00/00	
09/08/00	Order of crt, stay of mittimus Fiala Jr., Edward M.		10/03/00	1727
09/08/00	Motion deft - continuance - md Defense to file motion to reconsider sent. Fiala Jr., Edward M.		10/03/00	
09/08/00	Change priority status Fiala Jr., Edward M.	M	00/00/00	
10/03/00	Defendant in custody Garcia, Rodolfo		00/00/00	
10/03/00	Prisoner data sheet to issue Garcia, Rodolfo		00/00/00	
10/03/00	Continuance by agreement Garcia, Rodolfo		10/11/00	

DATE	PROCEEDINGS			
10/11/00	Defendant in custody Fiala Jr., Edward M.	00/00/00		
10/11/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00		
10/11/00	Motion to reduce sentence Fiala Jr., Edward M.	00/00/00	F	2
10/11/00	Continuance by agreement Fiala Jr., Edward M.	10/19/00		
10/19/00	Defendant in custody Fiala Jr., Edward M.	00/00/00		
10/19/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00		
10/19/00	Continuance by agreement Fiala Jr., Edward M.	11/08/00		
11/08/00	Defendant in custody Fiala Jr., Edward M.	00/00/00		
11/08/00	Special order States memo in support of an extended term. Fiala Jr., Edward M.	00/00/00		
11/08/00	Motion to modify sentence Fiala Jr., Edward M.	00/00/00	D	2

DATE	PROCEEDINGS			
11/08/00	Let mittimus issue/mitt to iss Fiala Jr., Edward M.		00/00/00	
11/08/00	Special order State appl. defendant appt. Free transcripts. Fiala Jr., Edward M.		00/00/00	
11/08/00	Credit defendant for time serv Credit 1,031 days. Fiala Jr., Edward M.		00/00/00	
11/08/00	Lesser included offense merged Count two merged with count one. Fiala Jr., Edward M.	C002	00/00/00	
11/08/00	Change priority status Fiala Jr., Edward M.	M	00/00/00	
11/13/00	Notice of appeal filed, trnsfr		00/00/00	
11/14/00	Notice of notice of app mailed		00/00/00	
11/14/00	Hearing date assigned		11/17/00	1713
11/17/00	Ill state appellate def apptd		00/00/00	
11/17/00	O/c free rept of procd ord n/c		00/00/00	

DATE	PROCEEDINGS		
11/17/00	Memo of ords & noa picked-up	00/00/00	
11/22/00	Defendant in custody Fiala Jr., Edward M.	00/00/00	
11/22/00	Prisoner data sheet to issue Fiala Jr., Edward M.	00/00/00	
11/22/00	Appearance filed Fiala Jr., Edward M.	00/00/00	
11/22/00	Continuance by agreement Fiala Jr., Edward M.	12/14/00	
12/05/00	Appellate court number asgnd	00/00/00	00-3871
12/14/00	Special order On call in error. Fiala Jr., Edward M.	00/00/00	
12/13/00	Common law record prepared	00/00/00	
12/26/00	Clr recd by app counsel State appellate defender	00/00/00	
01/05/01	Rept of prcds ord fr crt rpt	00/00/00	
04/10/01	Trans proc rec/filed clks off	00/00/00	
04/11/01	Report of proceedings prepared	00/00/00	

DATE	PROCEEDINGS			
04/19/01	Reprt/procds recd by app attry State appellate defender	00/00/00		
06/10/03	Special order Arrest & grand jury reports (etc).	00/00/00	F	2
06/10/03	Hearing date assigned	06/13/03	1727	
06/13/03	Defendant in custody Laws, Marjorie C.	00/00/00		
06/13/03	Prisoner data sheet to issue Laws, Marjorie C.	00/00/00		
06/13/03	Continuance by order of court Laws, Marjorie C.	06/27/03		
06/27/03	Defendant on bond Laws, Marjorie C.	00/00/00		
06/27/03	Continuance by order of court Laws, Marjorie C.	07/03/03		
07/03/03	Special order Motion for trial transcripts allowed Laws, Marjorie C.	00/00/00		
07/17/03	Special order Arrest & grand jury reports (etc).	00/00/00	F	2
07/17/03	M/d pctn for trnsct comlaw rcd	00/00/00	F	2

DATE	PROCEEDINGS		
07/17/03	Hearing date assigned	07/22/03	1727
07/22/03	Free report of prcds denied Laws, Marjorie C.	00/00/00	
07/22/03	Special order Clerk to notify Laws, Marjorie C.	00/00/00	
11/24/03	Special order Motion for an extension of time for p.c.	00/00/00	F 2
11/24/03	Hearing date assigned	10/01/03	1727
12/01/03	Continuance by order of court Laws, Marjorie C.	12/05/03	
12/05/03	Continuance by order of court Laws, Marjorie C.	12/19/03	
12/19/03	Special order Motion granted/ defendant given 90 days to fil pc/ clerk to notify Laws, Marjorie C.	00/00/00	
08/09/06	Mandate filed	08/16/06	1701
08/16/06	Special order Remanded Biebel, Paul Jr.	00/00/00	
08/16/06	Case assigned Biebel, Paul Jr.	08/18/06	1727

DATE	PROCEEDINGS	
08/18/06	Continuance by order of court Laws, Marjorie C.	09/07/06
09/07/06	Defendant on bond Laws, Marjorie C.	00/00/00
09/07/06	Public defender appointed Laws, Marjorie C.	00/00/00
09/07/06	Continuance by agreement Laws, Marjorie C.	09/14/06
09/14/06	Defendant in custody Laws, Marjorie C.	00/00/00
09/14/06	Prisoner data sheet to issue Laws, Marjorie C.	00/00/00
09/14/06	Continuance by agreement Laws, Marjorie C.	09/22/06
09/22/06	Defendant in custody Laws, Marjorie C.	00/00/00
09/22/06	Prisoner data sheet to issue Laws, Marjorie C.	00/00/00
09/22/06	Continuance by agreement Laws, Marjorie C.	10/18/06

DATE	PROCEEDINGS		
10/18/06	Defendant in custody Laws, Marjorie C.	00/00/00	
10/18/06	Prisoner data sheet to issue Laws, Marjorie C.	00/00/00	
10/18/06	Continuance by agreement Laws, Marjorie C.	11/01/06	
11/01/06	Defendant in custody Laws, Marjorie C.	00/00/00	
11/01/06	Prisoner data sheet to issue Laws, Marjorie C.	00/00/00	
11/01/06	Continuance by agreement Laws, Marjorie C.	11/15/06	
11/15/06	Defendant in custody Laws, Marjorie C.	00/00/00	
11/15/06	Special order O/c remand to supreme court for further proceedings - off call Laws, Marjorie C.	00/00/00	
12/18/06	Suppl rec recd by appl counsel States Attorney - One Volume	00/00/00	
09/26/07	Special order Appt of counsel	00/00/00	F 2

DATE	PROCEEDINGS		
09/26/07	Motion for writ of habeas corp	00/00/00	F 2
09/26/07	Hearing date assigned	10/01/07	1717
10/01/07	Special order On call in error Wadas, Kenneth J.	00/00/00	
11/06/07	Special order Motion to dismiss	00/00/00	
11/06/07	Hearing date assigned	11/16/07	1717
11/16/07	Defendant in custody Wadas, Kenneth J.	00/00/00	
11/16/07	Prisoner data sheet to issue Wadas, Kenneth J.	00/00/00	
11/16/07	Continuance by order of court Wadas, Kenneth J.	11/30/07	
11/30/07	Transferred Wadas, Kenneth J.	12/07/07	1717
11/30/07	Transferred Wadas, Kenneth J.	12/07/07	1727
12/07/07	Continuance by order of court Laws, Marjorie C.	01/04/08	
01/04/08	Continuance by order of court Laws, Marjorie C.	01/11/08	

DATE	PROCEEDINGS		
01/10/08	Post-conviction filed	00/00/00	
01/10/08	Hearing date assigned	01/23/08	1700
01/11/08	Continuance by order of court Laws, Marjorie C.	01/25/08	
01/10/08	Special order Motion for appointment of counsel	00/00/00	
01/10/08	Hearing date assigned	01/23/08	1700
01/17/08	Mandate filed 00-3871	01/31/08	1701
01/23/08	Case assigned Biebel, Paul Jr.	01/23/08	1727
01/31/08	Special order Affirmed by appellate court Biebel, Paul Jr.	00/00/00	
01/23/08	Post-conviction filed	00/00/00	
01/23/08	Hearing date assigned	02/14/08	1727
02/14/08	Continuance by order of court Laws, Marjorie C.	03/14/08	
03/14/08	Continuance by order of court Laws, Marjorie C.	03/28/08	

DATE	PROCEEDINGS	
03/28/08	Continuance by order of court Laws, Marjorie C.	04/25/08
04/25/08	Continuance by agreement Linn James B.	05/08/08
05/08/08	Continuance by order of court Laws, Marjorie C	06/06/08
06/06/08	Continuance. By order of court Laws, Marjorie C	06/27/08
06/27/08	Special order Post conviction petition is docketed Laws, Marjorie C.	00/00/00
06/27/08	Public defender appointed Laws, Marjorie C.	00/00/00
06/27/08	Continuance by order of court Laws, Marjorie C.	09/04/08
09/04/08	Motion deft - continuance - md Laws, Marjorie C.	12/04/08

DATE	PROCEEDINGS
	I hereby certify that the foregoing has been entered of record on the above captioned case Date 10/06/08 /s/ Dorothy Brown DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT
CRIMINAL DIVISION

Criminal
No. 98 CR 3865
Charge: 1st Degree Murder

THE PEOPLE OF THE STATE OF ILLINOIS,

vs.

MICHAEL RIVERA.

JURY TRIAL

REPORT OF PROCEEDINGS of the trial matters heard in the above-entitled cause on the 7th day of August 2000 before the Honorable EDWARD M. FIALA, Judge of said court.

* * * *

[A-168] H-a-h-n. James Hahn, first row, Mr. Hahn. Curtis McEwen, M-c-E-w-e-n; first row, sir. Jessie Allen, A-l-l-e-n; first row, Mr. Allen. Robert K-u-r-i-c-h; second row Mr. Kurich. Norma Gonzalez, G-o-n-z-a-l-e-z; second row please.

DELORIS GOMEZ,

the prospective juror herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q May I have your name, ma'am?
A Deloris Gomez.

Q Thank you, Ms. Gomez. That's G-o-m-e-z?
A Right.
Q Ms. Gomez, how long have you lived at your present address please?
A 26 years.
Q And who do you live there with?
A My daughter and her four children.
Q Thank you. And you are a business office supervisor for the County Hospital?
A Right.
Q How long have you been with the hospital?
[A-169] A 22 years.
Q And I see you have two adult children, is that correct?
A Yes, I do.
Q Tell us about their employment; and if they're married, the nature of their spouses' employment as well?
A My son is 32, and he works with a temperory agency for a financial company, Household Finance. My daughter is 33, and she works at Evergreen Plaza at Carimar (SIC) as an assistant manager.
Q Thank you. You've been a juror before?
A Yes.
Q Please tell us when and where?
A You know, when I filled that out, I forgot where it was. I think it was about five years ago at the Daley Center on the 23rd floor.
Q Did you participate in a verdict?
A Yes.
Q Was that a case where someone was seeking money damages for injuries?
A Yes.
Q You understand that this is an entirely different type of case?

[A-170] A Yes, I do.

Q Would you put out of mind anything that you may recall about your prior civil jury experience and base your verdict upon the law and the evidence you're going to see, hear, and receive in this courtroom?

A Yes, I can.

Q And if you're picked as a juror in this case, do we have your assurance you will not discuss with your fellow jurors your prior civil jury experience?

A Yes, I can.

Q Thank you very much. Incidentally, was there anything about your prior civil experience that in anyway at all would prevent you from being fair here?

A No.

Q Thank you very much. Now, do you know any of these lawyers?

A No, I don't.

Q Do you know Mr. Rivera?

A No, I don't.

Q Have you heard or read anything about this case?

A No, I have not.

Q Do you know or have you known any of the people I indicated may or may not be called to [A-171] testify?

A No, I do not.

Q Is any member of your immediate family or any very close friend associated with law enforcement as such?

A No.

Q Have you ever been the victim of a crime?

A No, I have not.

Q Has any member of your immediate family or any very close friend ever been the victim of a crime?

A No.

Q Have you ever been a party to a lawsuit?

A No.

Q Have you, any member of your immediate family, or any very close friend ever been arrested, charged, or accused of a criminal offense, or been a complainant or a witness in a criminal case?

A Not to my knowledge.

Q Now, there may be evidence, in fact, there will be evidence of gang activity. Would evidence of that type prevent you from being fair and impartial to both sides?

A No.

Q There will be evidence of the use of a gun. [A-172] Would evidence of that type prevent you from being fair and impartial to both sides?

A No.

Q And if you have leisure time, how do you spend it?

A I read a lot.

Q What newspapers or periodicals do you read on a regular basis?

A Sun-Times.

Q Now, you understand the allegations in this case, do you not?

A Yes, I do.

Q Is there anything about those charges that in anyway at all would prevent you from being fair to both sides?

A No, sir.

Q And apart from whatever I may have asked you as you sit there right now, can you think of

any reason whatsoever, Mrs. Gomez, why you couldn't be fair to both sides?

A No, I cannot.

Q Thank you very much.

* * * *

[A-207] Decker.

MR. DECKER: Thank you, your Honor.

EXAMINATION BY MR. DECKER:

Q Mrs. Gomez, you indicated in your job at Cook County Hospital, you work as a business office supervisor, is that correct?

A Yes, I do.

Q Do you have any contact with any medical treatment that's provided to any of the patients who come into Cook County Hospital?

A Yes, I do. I'm a supervisor in the orthopedic clinic.

Q And as part of that as being a supervisor, what are your duties there?

A I supervise the clerical staff.

Q Do you also have contact with the actual patients in the orthopedic clinic as well as—

A As far as checking them in.

Q Okay, and as the Court has said, there is going to be evidence here of weapon and gun shooting, and obviously Cook County Hospital is known for the treatment that it receives—that it gives to gunshot [A-208] victims?

A Uh-huh.

Q Is that going to have any effect upon you as you view the evidence in this case?

A No, it will not.

Q Okay, you know, and you understand you're not here to make a medical determination—

A Yes, I do.

Q —as to what type of treatment was provided; that's not an issue?

A I understand.

Q But with that fact and given the fact that Cook County Hospital has that connection and to the treatment of people—or the victims of violent crimes, is that going—

A Well, I'm in the clinic part. I'm not in the hospital itself. I'm in the out-patient clinic.

Q Well, or the treatment of those people in the out-patient clinic, is that going to set you off one way or another against my client?

A No, it will not.

Q Mr. Kurich, the fact that a gun is going to be—evidence is going to be of gun use, is that going to set you off one way or the other in this

* * * *

[A-210] Q I'm certain you're able to discern that they're two separate independent events?

A Yes.

MR. DECKER: If I may have one moment, your Honor

THE COURT: Of course.

(Brief pause.)

MR. DECKER: Your Honor, with thanks, we would ask to excuse Mrs. Gomez.

THE COURT: I'm going to ask you to remain, Mrs. Gomez. I'm going to ask counsel to join me, if the court reporter will join me, and the defendant will join me in chambers. Excuse me, ladies and gentlemen.

(The following proceedings were had outside the presence and hearing of the prospective jurors:)

THE COURT: We are in chambers. The defendant is present. All counsel being present.

Counsel, would you kindly articulate a basis of why you are excusing Ms. Gomez?

MR. DECKER: The Court has done it on its own motion sui spontae.

THE COURT: I will do it. It is the citizen's right to sit as a juror, and I will implicate myself [A-211] sui spontae if I feel somebody's rights are being impinged upon from—

MR. DECKER: Mrs. Gomez has a connection to a hospital that on a daily basis probably sees more gunshot victims than any other hospital in the world probably. Given the fact that she's in the orthopedic section, I think on a daily basis even though she's a supervisor, even though she's not a rehabilitive nurse, she on a daily basis sees those victims who are victims of violent crimes. For those reasons it constrains me. I know she has some kind of Hispanic connection given her name. I'm pulled in two different ways. For those reasons I asked that the—

THE COURT: Mrs. Deloris Gomez appears to be an African American female. State, let me hear from you.

MR. ROBERTSON: In terms of Ms. Gomez?

THE COURT: Yes.

MR. ROBERTSON: I don't believe this is a—this is a case where Marcus Lee laid in the street for two hours, nor is the treatment he received a treatment under any theory of the case. The simple question is Michael Rivera is who—Rivera is the man that shot Marcus Lee in the back of the head. I don't believe

the offered cause for Ms. Gomez is a sufficient reason [A-212] to excuse her as a juror.

MR. DECKER: If I could also complete the record, it does show that Mrs. Elms-Starks was accepted by the defendant. she's already been sworn on the second panel. She is a black woman.

THE COURT: The reason that's articulated, that particularly concerns me. This is the second African American female that the defense has sought to exclude, am I correct?

MR. ROBERTSON: That's correct.

MR. DECKER: That's—that would be correct, yes, your Honor.

MR. ROBERTSON: Ms. Elizabeth Alexander was excused earlier.

THE COURT: That's Correct.

THE COURT: I've heard her answers to the questions. I've looked at her jury information form, and I'm quite frankly very much concerned, Counsel, as to why Mrs. Deloris is being excused—Ms. Deloris Gomez is being excused. She works in a clinical division of this hospital. It may have the reputation of having many emergency cases, I presume, involving gunshot cases, but again she works in a business office, the very first line identifying her job. [A-213] Anything further from the State?

MR. ROBERTSON: Just one moment. Your Honor, we'd ask to have Ms. Gomez impaneled as a juror.

THE COURT: I did this sui spontae because I was concerned about the right of Mrs. Gomez to be a juror and participate. If the State in fact had done this, I certainly would have found they would have estab-

lished a prima facie case by the very reason—what I'm going to do is allow Ms. Gomez—allow her to be seated, not excuse her on the basis of your preemptory.

I feel under these circumstances the reasons given by you, Mr. Decker, do not satisfy this Court. As far as I'm concerned, it's more than a prima facie case of discrimination against Mrs. Gomez. I'm not going to allow her to be excused. She will be seated as a juror over objection.

MR. DECKER: Judge, can more questioning be done.

THE COURT: I'll allow you more questioning. Let's bring her back here if you'd like.

MR. DECKER: Yes, please. Also for the record, I am having an objection to the Court overruling my use of my preemptory challenge.

THE COURT: Oh, yes, by all means you can [A-214] certainly do that.

Would you be seated here please, Mrs. Gomez.

The record shall reflect that we are in chambers. We have the benefit of prospective juror, Mrs. Deloris Gomez, the defendant, and all counsel being present.

Mr. Decker, do you wish to make any further inquiry—voir dire as to Mrs. Gomez?

MR. DECKER: Mrs. Gomez, the question I was asking out there before, certainly you're mindful of the great number of emergency room people that come into Cook County Hospital and the great number of patients that are seen by your institution as a result of violent crimes, okay; you're aware of that, is that correct?

JUROR GOMEZ: Yes, I am.

MR. DECKER: You're also aware of the fact that Cook County Hospital has a great reputation in terms of the treatment of the emergency room victims that come in there and victims of gunshot wounds.

In this case evidence will also be that it was a shooting involving a weapon, and although the victim did not go to Cook County Hospital—and I think that's irrelevant—it's not a medical [A-215] malpractice case, does the fact that you see this on a daily basis, unfortunate, innocent victims of gun violence, is that going to cause you to have any degree, any degree, of prejudgments or prejudices against my client because he's accused of causing another victim of a violent crime; do you understand what I'm—

JUROR GOMEZ: Yes, I do. Let's me clar—

MR. DECKER: Do you understand the importance of why I'm asking you this? Because I can't read your mind; I'm just trying to pull out the information.

JUROR GOMEZ: First, let me clarify where I work. I work in Fantus Clinic; that's the out-patient part of Cook County, the clinical part of Cook County in—

MR. DECKER: in the basement there?

JUROR GOMEZ: No, on the first floor of Fantus clinic. The hospital is west of—east of where I am. I'm at the corner of Harrison and Ogden.

MR. DECKER: On the angle?

JUROR GOMEZ: On the angle, right. I work in the orthopedic section of the clinic which is on the first floor. I'm not where gun—the shot wounds and things come in which is the medical ER, okay, I'm in the out-patient clinic of Fantus.

[A-216] THE COURT: It's a separate building, is it not?

JUROR GOMEZ: It's a separate building, yes.

MR. DECKER: And I also know—medical records are kept there in the basement?

JUROR GOMEZ: In the basement of Fantus clinic.

MR. DECKER: But the individuals that are seen there at Fantus Clinic, I know they are not seen in the emergency room on an emergency room basis; you don't have the facilities there. It's mainly appointments that people are awaiting and people picking up medications. I believe there is a pharmacy also, I believe, there on the first floor?

JUROR GOMEZ: Yes, it is.

MR. DECKER: Certainly some of those victims are—certainly some of those patients were victims of gun violence?

JUROR GOMEZ: Yes, they were.

MR. DECKER: Does that fact set you off against my client as opposed to if he was charged with something else, you know, suppose if he was a defendant charged with theft or possessing a stolen motor vehicle, that's our concern?

JUROR GOMEZ: No, it does not. It does not affect me in that way.

[A-217] MR. DECKER: Do you still feel you'd be able to fairly view the evidence and follow the instructions and the law that his Honor, Judge Fiala, will be giving you?

JUROR GOMEZ: Yes, I do.

MR. ROBERTSON: I'm going to object.

THE COURT: The witness is—the prospective juror's last remark will stand. Any further inquiry?

MR. DECKER: No, not unless there is anything else you feel you need to tell us?

JUROR GOMEZ: No, that's it.

THE COURT: Thank you, ma'am.

MR. DECKER: Thank you.

THE COURT: Any questions by the State?

MR. ROBERTSON: No, your Honor.

THE COURT: Will you kindly have a seat in the jury box, Mrs. Gomez?

JUROR GOMEZ: Uh-huh.

THE COURT: Thank you.

The record shall reflect we are out of the presence of the juror, Ms. Deloris Gomez. The defendant and all counsel being present. And I've given Mr. Decker some additional leeway to make an inquiry of this juror.

Mr. Decker, do you wish to say anything further?

MR. DECKER: Yes, your Honor. My feeling [sic] are still the same. I feel that I'm trying to modify the composition of this panel. I'm not trying to exclude a woman because of her race, but—strike that—not trying to excuse a juror because of her race. But also I think I can also factor in the fact that she would now be out of the—by the fact that the jury is predominantly women, I'm trying to also get some impact from possibly other men in the case. I just don't feel that under these circumstances my client should be precluded from his reason to exercise a preemptory challenge.

THE COURT: Very well.

MR. DECKER: I don't know if the Court—I'm sure the Court has been in Fantus Clinic.

THE COURT: I can't comment upon that.

MR. DECKER: I'm not asking the Court to do that. I apologize. I'm just saying I've been there. It's wall to wall victims and patients coming in there, and I could see it's a disturbing place for me to be there when I've been there.

THE COURT: State, any other comment?

[A-219] MR. ROBERTSON: No, your Honor, we rest.

THE COURT: I had the opportunity to question Deloris Gomez who I find is a very intelligent lady. I considered her statements very carefully, her testimony very carefully, and I again feel that she shall sit as a juror. I shall not excuse her, and I will override your preemptory challenge as to Ms. Gomez, and I find no basis for cause. So Mrs. Gomez shall sit as a juror.

MR. DECKER: Based on the fact that the panel is now changed, I would wish to renew another preemptory challenge if I may in her stead although I'm not waiving the issue. If I could have the cards one moment please, your Honor.

THE COURT: Off the record.

(Whereupon discussion was had between the Court and counsel off the record after which the following proceedings were had:)

MR. DECKER: Judge, we would ask—once again, we have indicated our objection to the procedure as to Ms. Gomez; however, we would ask to excuse as our fourth preemptory Mr. Kurich.

[A-220] THE COURT: With reluctance I will allow it. Let's go. Join the officer.

(The following proceedings were had in the presence and hearing of the prospective jurors:)

THE COURT: Defendant is present in open court. Counsel on his behalf and the People are present. Prospective jurors are present. And so it's quite clear so you can understand, Mrs. Gomez will sit as a juror. Mr. Kurich shall be excused, motion defendant. Kindly join the officer if you would please.

Kindly move down if you would in the second row, ladies and gentlemen.

Mark Nielsen, N-i-e-l-s-e-n; second row, Mr. Nielsen, please.

NORMA GONZALEZ,

the prospective juror herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q May I have your name, ma'am?
A Norma Gonzalez.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT
CRIMINAL DIVISION

[Filed SEP. 8, 2000]

No. 98 CR 3865

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

MICHAEL RIVERA,
Defendant.

MOTION FOR NEW TRIAL
MOTION TO ARREST JUDGMENT

NOW COMES Defendant, Michael Rivera, by and through his Attorney, Steven R. Decker, and respectfully requests that this Honorable Court grant Defendant a new trial, or in the alternative, to arrest judgment. In support thereof, Defendant states as follows:

1. Defendant Michael Rivera was charged with the offense of murder.

2. That following a jury trial, Defendant was found guilty of the offense of first degree murder on August 10, 2000.

3. Defendant submits he was denied equal protection and due process of law.

4. Defendant submits he was not proved guilty of any offense beyond a reasonable doubt.

5. Defendant furthermore submits that he did not receive a fair trial when this Honorable Court refused to disclose certain information, which was viewed by the Court "in camera" regarding one of the principle witnesses, Susan Shelton.

6. Defendant furthermore submits he was denied a fair trial during the jury selection in this matter. At the jury selection in this matter, the State exercised their first preemptory challenge against potential juror Teresa Charo. When the Court asked the State to provide reasons for the exercise of their challenge of the Hispanic juror (Defendant Michael Rivera is also Hispanic), the State refused to articulate their reasons.

7. Defendant attempted to exercise a challenge against Mrs. Dolores Gomez, a black woman. Defendant's request to have Mrs. Gomez excused was rejected by the Court *sua sponte*, and eventually was seated on the jury. This action by this Court, was done after Defendant had previously accepted a black woman on the jury and had now attempted to utilize its third preemptory challenge against Dolores Gomez. At the hearing in chambers, Defendant offered his race-neutral reasons for excluding the veniremember. Defendant herein submits that the reasons which he gave, including the venireperson's employment at Cook County Hospital, which treats an extraordinary large number of victims of violent crimes, was not pretextual. Defendant herein submits that given the undisputed fact that Defendant previously had allowed another black individual to sit on the jury, Ms. Elms Starks, Defendant certainly was not exercising

purposeful racial discrimination. As has been indicated by our Appellate Court in *People v. Rivera*, (First Dist. 1999) (No. 1-97-2158, September 22, 1999) "the explanation need not be persuasive, or even plausible, and a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). That is, a neutral explanation is one based upon something other than a juror's race. *People v. Munson*, 171 Ill.2d 158, 174, 662 N.E.2d 1265, 1272 (1996). Defendant submits that the Court's determination that a reverse Batson claim could have been made by the State was improper in that absent a showing of an inherent discriminatory intent in Defendant's explanation, the reason which was offered, employment at Cook County Hospital, should have been deemed race-neutral by this Honorable Court. See, *Hernandez v. New York*, 500 U.S. 352, 359 (1991). Defendant furthermore submits that the Court's refusal to allow the Defendant's use of his preemptory challenge was additionally damaging to the Defendant when that juror was seated after being excused by the Defense, in open court, and that juror later becoming the foreperson of the jury.

8. Defendant furthermore submits that error was committed by the trial court's refusal to strike all references to the statements by witnesses Susan Shelton and Miguel Rodriguez that the Defendant had recently been released from jail.

9. Defendant furthermore submits that error was committed when the trial court refused to allow the Defendant to introduce evidence that

Susan Shelton had previously received a juvenile adjudication for a weapons offense.

10. Defendant furthermore submits that error was committed when the trial court did not allow the prior UUW conviction of witness Miguel Rodriguez as impeachment.

11. Defendant furthermore objects to the failure of the State to promptly disclose all material benefits that had been provided to their witnesses, including hotel and food allotments, until the conclusion of the witnesses' testimony.

12. Defendant furthermore submits that error was committed during the State's rebuttal argument when the following comments were made by Assistant State's Attorney Roberson:

a. "Mr. Polite sitting there . . ."

b. "takes a lot of courage to get on the witness stand"

c. "There is no reasonable doubt here"

d. "They [the witnesses] told you the truth"

13. Defendant objected to a juror instruction 3.04, Evidence of Other Crimes, as this instruction gave the inference that the Defendant was involved in other crimes which were not charged.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant Defendant a new trial.

Respectfully submitted,

/s/ Steven R. Decker
STEVEN R. DECKER

IN THE CIRCUIT COURT OF THE
COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

Case No. 98-CR-3865
Charge: Murder

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MICHAEL RIVERA

REPORT OF PROCEEDINGS had before the HONORABLE EDWARD M. FIALA, Judge of said court, on the 8th day of September, 2000.

* * * *

[E3]THE COURT: The record is going to reflect this is the case of people of the state of Illinois versus Michael Rivera. Mr. Rivera is present in open court. His counsel is present, Mr. Decker. People are present as well.

Defendant has filed a timely motion for new trial and motion for arrest of judgment.

MR. DECKER: Steven R. Decker. I did yesterday or the day before faxed the state's attorney my motion for new trial motion and motion in arrest of judgment. I just wish to formally submit the same to the Court. I believe a courtesy copy may have been provided to the Court prior to today's date.

THE COURT: Thank you.

MR. DECKER: Is [sic] presented within 30 days.

THE COURT: It's timely made, counselor.

MR. DECKER: Thank you.

THE COURT: Are the People prepared to proceed?

MR. ROBERTSON: We are, Your Honor.

THE COURT: Mr. Decker, would you please present your motion.

MR. DECKER: Yes. Your Honor, if I may, the Court heard this matter to a jury trial and we would submit that during the course of the trial we believe that [E4] there was an insufficient amount of evidence to prove the defendant guilty of any offense beyond a reasonable doubt.

Prior to the trial we had made a request for certain documents to be disclosed regarding one of the principal witnesses, Susan Shelton. Court viewed those documents which were provided to the Court through the subpoena which we submitted to the Chicago Police Department and the Office of Professional Standards.

Once again we believe that that evidence would have been important for impeachment purposes and that we should have had the opportunity of being able to examine that principally where Susan Shelton's credibility we believe was in question not only at the time we presented it but certainly during the course of the trial with the inconsistent statements that she gave not only between her prior testimony but also the inconsistent statement she gave compared to the other individuals that she had associated herself with.

Before the actual evidence was submitted we submit that the defendant was denied a fair trial by improper jury selection. In this matter when the State was called upon to exercise their right to [E5] peremptory they exercised their first challenge against Teresa Charles. At that time I brought to the Court's attention that she was an Hispanic juror.

The Court made inquiry of the State for the reasons for the exercise of that challenge and the State at that time despite the Court inviting them to make that—to spread of record the reasons for that they refused to provide any reasons for the exercise of their challenge against an Hispanic juror and I think it's not disputed that my client Michael Rivera also is Hispanic.

Subsequently thereafter as indicated in paragraph seven of my motion a black woman was called upon to be a potential juror, and when I say woman I believe that the State of the law is it's irrelevant whether it was woman or a man, but a black person was called upon and we accepted that individual.

We then exercised a challenge against another black female and our second challenge that we were going to exercise against the black individual was against Mrs. Delores Gomez, an individual who had an Hispanic name.

After I had made that motion in open court in front of Miss Gomez as the Court had instructed us to [E6] do in the jury selection process, the Court on its own motion respectfully asked her to remain. There was a side bar. I explained at that time that

the defendant was concerned for two reasons of keeping Miss Gomez. One, that it appeared to us that there were a considerable number of women on the jury already and other women that were potentially called upon that were already seated, although they hadn't been questioned. And as I believe the juror was eventually selected that there were only two or three men on the jury panel of twelve.

And more importantly we were extremely concerned upon her involvement with Cook County Hospital and the Fantas Clinic and seeing on a daily basis so many people that were victims and unnecessary victims of crimes.

Your Honor, as indicated in another case, People versus Rivera, we believe that even though the explanation we gave apparently wasn't persuasive and apparently according to the Court wasn't plausible or a legitimate reason because apparently respectfully the Court believed that it didn't make sense, in either event the reason that we gave at that time for excusing her was a reason that did not deny equal [E7] protection, and the reason that we gave was a neutral explanation on something other than the juror's race. Mindful of the fact that the first black person that we could have challenged the defendant did not.

We believe the Court's determination of (unintelligible) sua sponte a reverse Batson claim was improper in this matter of seating this juror where we clearly gave a race neutral reason. There wasn't any discriminatory intent of the defendant's explanation and we believe this was more compounded when not only was that juror seated, but

apparently according to the verdict form she later became the foreperson of that jury and for that reason the defendant feels very, very strongly respectfully that error was committed in the jury selection process.

In the—As indicated in Paragraph 8 testimony was provided by Susan Shelton. We would submit uninvited as to the defendant being released from jail and also was also done by Miguel Rodriguez.

We had made a motion to strike that testimony. Court refused to strike that portion of Miguel Rodriguez's testimony the defendant had been recently released from jail, and we feel that that was even more compounded when there was a jury instruction [E8] which was given in terms of evidence of the other crimes and we believe that under this case the inference was that indeed it was the defendant that was involved in other crimes which were not charged and the focus of that instruction should have been directed more towards the other witnesses who were involved in other crimes, and for those reasons we believe that that I.P.I. instruction should have been modified in some way to let the jury know that principally that instruction was not to be focused upon the defendant but rather was to be focused upon Mr. Oberlin, Miss Shelton, Mr. Miguel Rodriguez.

Finally, in closing arguments we believe that the State committed improper arguments in their closing by referencing to the defendant as Mr. Polite sitting there. Also made a statement that—and I believe I have the statement that Mr. Robinson said correctly "takes a lot of courage to get on the witness stand". Of course he's referring

to the witnesses who testified, but by the same token the defendant who did not get on the stand gives a inference that defendant by his failure to get on the stand is an individual lacking of courage, and we believe that that is an improper comment upon the [E9] defendant's request to remain silent.

He also vouched for the fact that there is no reasonable doubt here and also vouching for witnesses as indicated in subparagraph D that the witnesses told you the truth.

Your Honor, we believe that in this case the evidence clearly was not overwhelming, and that there was substantial issues presented here as to the credibility of the State's witnesses and whether or not the defendant could have even have been present at the location, let alone having committed the crime, and for all the reasons that we have listed in this motion, for all the reasons that we also raised at trial, for all the objections which we made which were overruled, motions for mistrial which were denied and we would be asking the Court to set aside the jury verdict and grant the defendant [sic] at new trial.

THE COURT: Thank you, Mr. Decker. Mr. Robertson, you may respond.

MR. ROBERTSON: Your Honor, thank you. The—Starting first with the issue of reasonable doubt, as Your Honor knows, the jury heard three different witnesses who had either firsthand knowledge of Mr. Rivera's killing of Marcus Lee or third party [E10] admission made by Mr. Rivera to that killing, and certainly more than enough to prove him guilty beyond a reasonable doubt. Those

witnesses were seen by the jury and they were believed by the jury.

With respect to the in-camera investigation, Your Honor investigated those matters, reviewed those records and determined they were not relevant for these proceedings. There is no indication as to what those—specifically how Miss Shelton would have been impeached on those.

Your Honor, turning to the issue of our sole use of one peremptory challenge in this matter. That that somehow evidenced a pattern of discrimination, I would indicate to you that I believe three or four Hispanics wound up sitting on the jury, that the only peremptory challenge we exercised was against one individual who was a Hispanic individual.

Your Honor found at that time there was no pattern of discrimination. I want that to be clear for the record. Mr. Decker has referenced in his motion and referenced in argument today that Your Honor asked for my reason. And I withheld that reason even at Your Honor's suggestion.

There is case law is replete with the fact [E11] that once I offer a reason for my determination—I understand Your Honor's policy, but once I offer that reason that collapses the Batson analysis and makes the determination of whether a prima facie case of discrimination exists entirely moot. Particularly in a case like this where only one individual was stricken by the People. I am very reluctant to give that information at this time because it will be turned on appeal almost as it's been turned here as something that I'm doing

wrong and something that indicates that I should be offering a race neutral explanation, which I clearly should not be.

Your Honor, in terms of Mr. Decker's pattern of discrimination and excluding two black females from the jury, I would state that Your Honor correctly found that Mr. Decker, defense counsel engaged in a prima facie case of a pattern of discrimination and that his reasons were pretextural.

I would point to the following. That Mr. Decker struck the first juror, a Miss Alexander, who had all the qualifications of a juror, who was a black female, had no possible challenge for cause. At that time I note I was not making a reverse Batson motion at that time, but I clearly had some concerns.

[E12] Mr. Decker refers to the second black lady that he left on the jury. I would point out to Your Honor that that individual had a husband who was convicted of a crime and actually had done I believe time, I think two years on a crime. Certainly that would be a reason where a defendant would want someone whose husband, the person they loved the most, would spend the time on the jury and Mr. Decker should not be able to hide—not hide, but should not be able to champion the cause of oh look, I left this lady on the jury to show he's not engaging in a pattern of discrimination when that juror had a trait that was clearly favorable to his client.

Your Honor, third, I want to correct some things about Miss Gomez. Mr. Decker has stated she works for Cook County Hospital and that she sees a

number of victims of violent crimes. I believe Miss Gomez went out of her way to indicate to the contrary, that she worked at the outpatient clinic, that she was a supervisor in the clerical department, that she did not see many, many victims of violent crime and she did not—And Mr. Decker had I believe two opportunities to question her prior to us going back into chambers, and after we went back in with Miss [E13] Gomez where he solely focused on that issue and he was not able to get her to go the way he wanted to.

Miss Gomez maybe more than any of other jurors displayed the characteristics of a juror who wanted to be on the jury, who repeatedly stated she could be fair and there was no reason for excusing her.

Mr. Decker has raised the issue of sua sponte, that Your Honor raised this issue sua sponte. I believe that was the entirely appropriate thing for Your Honor to do. As more than anyone else in this courtroom Your Honor has an obligation as you know to uphold the workings of the justice system, and when Your Honor sees an abuse of that system going on you cannot turn a blind eye to it.

This is in all areas of the law, including and I would say it applies even moreso in this case, in the case of instructions or even evidence Your Honor has a duty to make sure that the wheels are turning right, but when we take the indication of the jury selection and the rationale used in those cases where it is the jurors right to serve on a jury there's no one here. It's not the jury can make an objection and say listen, I really want to be on this [E14] jury. It's Your Honor more than anyone who looks out for the jurors right because that's the

rights we're concerned with in Batson versus Kentucky and its progeny.

Your Honor, I would cite the case of People v. Williams at 252 Ill. Ap. 3rd. 704. I would also cite People versus Harvey at 209 Ill. Ap. 3rd. 733, People versus Beard at 263 Ill. Ap. 3rd. 1077 and People versus Waley 184 Ill. Ap. 3rd 459.

The first three of those cases I read all involve sua sponte instances where the trial court made the determination that a case of—initially raised the question of Batson. I will only read one selection of People versus Williams and that would be where the Court states unequivocally the selection of an all white jury in Cook County is a circumstance which a trial court can take notice of even if defense counsel fails to raise such an issue.

Here the trial court sua sponte called a Batson hearing. Your Honor, that clearly recognizes Your Honor's right to do that. Moreover, even after it was started Your Honor asked for my or the State's position in this matter.

At that point I asked that we make it—[E15] finds a pattern of discrimination, find that Mr. Decker's reasons were pretextural and to impanel the juror. That was my request. So I don't think that—I think that that cuts against Mr. Decker's claim that sua sponte.

With respect to the questions of—put to Miss Shelton and Mr. Rodriguez concerning their—Let me go back to Batson for one point—two points. The first is the other evidence that this was a pattern of discrimination is there was after Miss Gomez was impaneled as a juror Mr. Decker made

another peremptory challenge, and although it's not clear from the record because there was an off the record discussion at this point, my memory is that Mr. Decker said now that the complexion of the jury has changed I would like to exercise different peremptory challenge.

He then exercised a peremptory challenge against a white male who was sitting in the back row Mr. Courage, I believe. Miraculously next to Mr. Courage was Miss Gonzalez, a Spanish individual whom Mr. Decker obviously wanted to get on the jury.

I think that when you are considering race and you initially allow a juror to stay on and then bump that juror so you can get a person of a different [E16] race that shows you are engaging in a pattern of discrimination.

Mr. Decker states that oh one of the reasons Miss Gomez should be bumped was kind of implies that there were a lot of women on the jury, but yet the strike against Mr. Courage was solely to put Miss Gonzalez, another woman, albeit one of Spanish instead than black descent on the jury.

The questions put to Miss Shelton and Mr. Rodriguez where they indicated that Mr. Rivera had been in jail, those were questions—not a single question where they blurted it out, oh did you see my client in January of '98 or what happened about December of '98.

Mr. Decker was fishing, and it was only after he kept fishing he got bit. At that point he asked for a side bar. Your Honor warned him during that side bar you can't keep—you know, you asked the

question and the first time with Miss Shelton you instructed the jury to disregard that. With Mr. Rodriguez Mr. Decker came back and did the same thing again, same type of questions.

Your Honor, I do believe that's trial strategy on his part. I think at that time there may [E17] have still been evidence that Mr. Rivera may have testified and he could have gotten those witnesses to say oh yeah, I saw him every day I was around him and had Mr. Rivera come and say look, I was incarcerated. He could have come back and shown that those witnesses were lying.

Your Honor, I would cite the case of People versus Washington 127 Ill. Ap. 3rd which I cited prior to trial regarding juvenile adjudications. And with respect to closing arguments I would state this as follows, the claim about Mr. Polite.

Mr. Decker during his examination of Susan Shelton specifically went into Mr. Rivera's demeanor, oh, he was a nice man, you liked his manners, he was polite. He went into it. I just referred to Mr. Rivera as Mr. Polite, a point that Mr. Decker for whatever reason wanted to get before the jury.

With respect to the courage of testifying, if you read those remarks they solely went to Susan Shelton starting off talking about her first sexual experience that she had to do on the stand in front of 14 people, and I think that takes a lot of courage and that's what I was saying. I think that was a proper argument. Then I worked into the other two witnesses. [E18] At no time was the defendant ever mentioned.

Finally, the last two is no reasonable doubt and they told you the truth. I would point out the second one, Your Honor instructed the jury that they would determine the truth, but if I'm to be faulted for those two, Mr. Decker's almost entire closing argument involved his personal beliefs, I's, that he believed there was no reasonable doubt present.

If in some manner I did err by including an "I" when I shouldn't have, it was clearly minor in comparison to the closing argument of Mr. Decker. It would be a raindrop versus a rain forest.

Finally, with respect to the other crimes instruction Mr. Decker is saying that somehow the jury was confused. The I.P.I.'s were given; it was clear a witness' conviction and there was no evidence of anyone being convicted but witnesses, were put before were solely to go to their credibility.

The other crimes evidence instruction with respect to the defendant's motive and intent did not talk about other crimes. It talked about other conduct not alleged in the indictment.

And specifically, if we did not put that in there then the claim where the defendant chased down [E19] two Maniac Latin Disciples and even the part where he's threatening John and Steven Crone in the van could have come back as (unintelligible) the jury could have considered those other crimes.

Your Honor, I would ask you to affirm or to upheld the conviction and deny counsel's motion.

THE COURT: Thank you. Mr. Decker, by way of rebuttal please.

MR. DECKER: May I respond. I don't believe the record will reflect as State has just asserted that three or four Hispanic people sat on the jury. Your Honor, I believe that if I wished to exercise the peremptory challenges after the Court refused to allow me to exercise that peremptory against Miss Gomez. Consequently I had more peremptories to use, and as part of it if I thought that somebody else may have been more favorable than the person who was selected then knowing that I have more peremptories to exercise I cannot be faulted or else speculated by the State as to the reasons why the gentleman was removed after initially having been seated.

Your Honor, I would submit the State's reasons are pure speculation as to whom was selected, but that's part of the use of peremptory challenge. [E20] Under the State's analysis it would be hard pressed to come up with a non pretextural determination for anyone being excused, and I cannot imagine a more individual worthy of a peremptory challenge, and I'm not talking about for cause, than in this case Miss Gomez.

I had never said that she was a nurse at Cook County Hospital. But she did admit that she's there in the business office and she sees people on every day who are coming there for prescriptions or whatever who were victims of violent crimes, and if that's the reason the defendant wanted to use, and it doesn't make a difference if indeed in their own mind she didn't have bias or not, because that's not the test that the Court must analyze. But the test is whether or not some legitimate accurate reason was used that was based on something other than a

juror's race, and under those circumstances we believe that we used it in a correct way and by allowing the Court to take away the peremptory challenge in the manner that it did then we would just be better off if both sides had no peremptory challenges and only relied upon motions for cause because to do it under this basis then no reasonable argument could ever be made for excluding [E21] any juror under any reason.

THE COURT: Thank you. This Court has had the opportunity o [sic] listen to the arguments of very able counsel relative to the defendant's motion for new trial and the motion to arrest judgment. I've considered the evidence adduced, I've considered as I've said before the very careful arguments made by both counsel.

I've considered the evidence heretofore adduced. And upon a very careful consideration of the totality of those factors, the motion for new trial be and same hereby is denied. The motion in arrest of judgment be and same hereby is denied as well.

We'll proceed to sentencing. Have both sides received a copy of the P.S.I.?

MR. DECKER: Yes Your Honor.

THE COURT: Very well. It's dated today's date September 8, 2000. Is there a waiver of the three day period by both sides?

MR. DECKER: Yes, Your Honor. I took the liberty of removing the—having your clerk give me the pre-P.S.I. and I gave to it my client a few hours ago. We've reviewed it. There were no significant changes to it other than what's been reported.

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
MICHAEL RIVERA)
Defendant

CASE NUMBER 98CR0386501
DATE OF BIRTH 01/27/71
DATE OF ARREST 01/11/98
IR NUMBER 0846925 SID NUMBER 028420630

ORDER OF COMMITMENT AND SENTENCE TO
ILLINOIS DEPARTMENT OF CORRECTIONS

ENTERED
SEP 08 2000
LAURA MOFFETT

The above named defendant having been adjudged guilty of the offense(s) set forth below hereby sentenced to the Illinois Department of Corrections as follows:

Count	Offense	Statutory Citation	Sentence	Class
2	Murder/Strong	720-5/9-1(A)(2)	YRS. 85 MOS. 0	M
	and said sentence shall run (concurrent with) (consecutive to) the sentence imposed on:			
	and said sentence shall run (concurrent with) (consecutive to) the sentence imposed on:		YRS. MOS.	
	and said sentence shall run (concurrent with) (consecutive to) the sentence imposed on:		YRS. MOS.	
	and said sentence shall run (concurrent with) (consecutive to) the sentence imposed on:		YRS. MOS.	
			YRS. MOS.	

On Count ___ defendant having been convicted of a class ___ offense is sentenced as class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count 2 defendant is sentenced to AN EXTENDED TERM PURSUANT TO 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served custody for a total credit of 970 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be (concurrent with) (consecutive to) ie sentence imposed in case number(s) _____
ND: (concurrent with) (consecutive to) the sentence imposed under case number(s) _____

IT IS FURTHER ORDERED that Stay of Mitt 10-3-00

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff e the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take s/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED SEPTEMBER 08, 2000

ENTER: 09/08/00

CERTIFIED BY L MOFFETT
DEPUTY CLERK

JUDGE: FIALA JR., EDWARD M. 0427

CERT 09/08/00 09:49:52

19

IN THE CIRCUIT COURT OF COOK COUNTY

PLE OF THE STATE OF ILLINOIS)
V.)
AEL RIVERA)

CASE NUMBER 98CR0386501
DATE OF BIRTH 01/27/71
DATE OF ARREST 01/11/98
IR NUMBER 0846925 SID NUMBER 028420630

ORDER OF COMMITMENT AND SENTENCE TO
ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below hereby sentenced to the Illinois Department of Corrections as follows:

Offense	Statutory Citation	Sentence	Class
MURDER	720-5/9-1(A)(1)	YRS. 85 MOS.	M

and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

		YRS. MOS.	

and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

		YRS. MOS.	

and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

		YRS. MOS.	

and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

		YRS. MOS.	

In Count ___ defendant having been convicted of a class ___ offense is sentenced as a Class X offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

In Court ___ defendant is sentenced to AN EXTENDED TERM PURSUANT TO 730 ILCS 5/5-8-2

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 1031 days as of the date of this order.

IT IS FURTHER ORDERED that the above sentence(s) be (concurrent with)(consecutive to) the sentence imposed in case number(s) ___ (concurrent with)(consecutive to) the sentence imposed under case number(s) ___

IT IS FURTHER ORDERED that Writ to issue

Count ② merged in to Count ①

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED NOVEMBER 08 2000 ENTER: 11/08/00

CERTIFIED BY A SMITH
DEPUTY CLERK

ENTERED
ALMONDA SMITH
NOV 08 2000
CLERK OF CIRCUIT COURT
CRIMINAL DIVISION

JUDGE: PAULA M. EBERLE #

67a

BEST AVAILABLE COPY

APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, SIXTH DIVISION

No. 1-00-3871

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

MICHAEL RIVERA,
Defendant-Appellant.

May 7, 2004

Justice TULLY delivered the opinion of the court:

Following a jury trial, defendant, Michael Rivera, was found guilty of first degree murder (720 ILCS 5/9-1(A)(1) (West 1998)) and sentenced to 85 years' incarceration. Defendant timely appeals contending (1) the trial court erred when it *sua sponte* raised a reverse-*Batson* (see *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)) challenge to his use of a peremptory challenge during jury selection, (2) his extended-term sentence violated the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and (3) his extended-term sentence violates his right to a jury trial as guaranteed by the Illinois constitution. We affirm.

BACKGROUND

Since defendant has not raised a challenge to the sufficiency of the evidence supporting his conviction

for first degree murder, we may present the case facts with tragic and clear simplicity. Defendant was a member of the "Insane Deuces" street gang and held the rank of "chief enforcer." In the early morning hours of January 10, 1998, defendant was riding in a van with several individuals who were gang members. Defendant saw the victim walking near a housing complex known as the Lathrop Homes. Defendant mistakenly believed that the victim was a "Stone," a member of a rival gang. Defendant left the van accompanied by two fellow gang members. Defendant fired several shots from a revolver. One bullet struck the victim in the back of his head and killed him. After the shooting, defendant and the two other gang members returned to the van yelling gang slogans including "Stone killer." Later, displaying the revolver to other gang members, defendant bragged that he was a "Stone killer." The police recovered the revolver from another gang member.

Defendant's first contention arises out of his attempt to use a peremptory challenge during jury selection. The challenged juror was Deloris Gomez, a business office supervisor at Cook County Hospital. During *voir dire* questioning by defense counsel, Gomez acknowledged that Cook County Hospital is known for the treatment of gunshot victims. Gomez explained that she did not work at the hospital itself but at an outpatient clinic associated with the hospital. Gomez indicated that she would not be "set off one way or another" against defendant.

Following *voir dire*, defense counsel announced his intention to use a peremptory challenge against Gomez, and the trial court called for a conference in chambers. The trial court asked defense counsel to

articulate a basis for excusing Gomez. The trial court said it was acting *sua sponte* because it felt compelled to react to what it perceived as a violation of the juror's rights. Defense counsel stated that he was excusing Gomez because she worked in a hospital that probably treats more gunshot victims than any other in the world, and she probably sees the victims of violent crime on a daily basis. The parties agreed that Gomez was the second African-American woman the defense had attempted to exclude and that the defense had previously accepted one other African-American woman.

The trial court commented that, although Cook County Hospital might have the reputation of having many emergency cases, Gomez worked in a business office in a clinical division of the hospital. The trial court held that the reasons given by defense counsel did not satisfy it, and ruled that Gomez would be seated over defense counsel's objection. However, the trial court granted defense counsel's request for additional *voir dire* questioning of Gomez.

During further questioning by defense counsel, Gomez admitted that she was aware that the hospital treated a "great number" of patients who were the victims of violent crimes. Gomez again indicated that she worked in a clinical division separate from the hospital's emergency room and that the clinic was in a separate building. Gomez admitted that some of the patients being treated at the clinic were the victims of violent crime. Gomez again indicated that her experience working in a hospital that treats the victims of violent crimes did not affect her ability to be fair and follow the instructions of the trial court. Defense counsel indicated that the basis for his peremptory challenge remained the same, but added

that as an additional factor he was challenging Gomez because the jury was predominantly women and he was trying to get the impact of other men on the case. Defense counsel further indicated that he had been in the clinic and that it was a disturbing place with "wall to wall" victims. The trial court again held that Gomez would be seated as a juror over defense counsel's objection.

Defendant's remaining contentions challenge the validity of his extended-term sentence. During the sentencing hearing, the trial court asked the parties to discuss the impact of the *Apprendi* decision on the State's request for the imposition of an extended-term sentence. The State argued that *Apprendi* did not apply to Illinois' murder statute because the maximum possible sentence for first degree murder was death and an extended-term sentence could not be greater than a sentence of death. The State further argued that defendant was subject to an extended-term sentence because the crime was committed in an exceptionally brutal and heinous manner and, alternatively, because defendant held a leadership position in the gang. Defendant responded that the maximum sentence for first degree murder was 60 years' incarceration and that any factor extending that term must be submitted to the jury. Defendant further argued that, even if the trial court was allowed to make the determination, the evidence did not support a finding that he acted in a brutal or heinous manner or that he held a leadership position in the gang. The trial court held that *Apprendi* did not apply because the maximum penalty for first degree murder was death. The trial court found that defendant was subject to an extended-term sentence because he was the chief-enforcer of the gang and sentenced defendant to a term of 85 years' in-

carceration. Defendant subsequently filed a motion to reconsider his sentence incorporating his *Apprendi* arguments. The trial court denied defendant's motion.

ANALYSIS

Defendant first contends that the trial court erred when it *sua sponte* raised a reverse-*Batson* challenge to his attempt to use a peremptory challenge against Gomez. The starting point for any discussion of the discriminatory use of peremptory challenges is the *Batson* case itself. In *Batson*, the Supreme Court held that the use of peremptory challenges by the State in a racially discriminatory manner violates an accused's right to equal protection "because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717, 90 L.Ed.2d at 80. However, the Supreme Court also recognized the long-established principle that racial discrimination in jury selection unconstitutionally discriminates against the excluded juror. *Batson*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81, citing *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880). Moreover, in a passage highly relevant to the case at bar, the Supreme Court identified a broader interest stating:

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

The Supreme Court concluded that the State's use of peremptory challenges is subject to the commands of the equal protection clause stating:

> "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried [citation], the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719, 90 L.Ed.2d at 82-83.

In response to the potential equal protection violations, the Supreme Court created the now familiar three-step procedure used to address potentially discriminatory peremptory strikes. *Batson*, 476 U.S. at 93-98, 106 S.Ct. at 1721-1724, 90 L.Ed.2d at 85-89; *see also People v. Harris*, 206 Ill.2d 1, 17, 276 Ill.Dec. 419, 794 N.E.2d 314 (2002) (outlining the three-step procedure as applied by Illinois courts). First, the defendant must make a *prima facie* showing that the prosecutor exercised peremptory challenges on the basis of race. *Harris*, 206 Ill.2d at 17, 276 Ill.Dec. 419, 794 N.E.2d 314. Second, after a *prima facie* case is made, the State must articulate a race-neutral explanation for the excusing the venirepersons in question. *Harris*, 206 Ill.2d at 17, 276 Ill.Dec. 419, 794 N.E.2d 314. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Harris*, 206 Ill.2d at 17, 276 Ill.Dec. 419, 794 N.E.2d 314. The *Batson* court, however, expressly refused to rule on whether the same procedure should be applied to

defense counsel's use of peremptory challenges. *Batson*, 476 U.S. at 89 n. 12, 106 S.Ct. at 1719 n. 1, 90 L.Ed.2d at 82 n. 12.

The Supreme Court addressed the question it left unanswered in *Batson* in *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). In *McCollum*, the Supreme Court was presented with a so-called "reverse-*Batson*" issue, *i.e.*, whether the limitation on peremptory challenges imposed on the State in *Batson* applies equally to criminal defendants. The Supreme Court observed that its resolution of the issue depended on the answers to the following four questions:

> "First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case." *McCollum*, 505 U.S. at 48, 112 S.Ct. at 2353, 120 L.Ed.2d at 44.

The Supreme Court answered the first three questions in the affirmative and the last in the negative and concluded that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. *McCollum*, 505 U.S. at 59, 112 S.Ct. at 2359, 120 L.Ed.2d at 51.

Defendant contends that *McCollum* does not apply to the case before us because it was the trial court,

not the State, that raised the challenge to his use of a peremptory challenge. Defendant focuses his argument on the third question identified by the Supreme Court in *McCollum*. Defendant argues that although the State may have had standing to object to his use of a peremptory challenge, the trial court lacked standing and therefore lacked the power to act *sua sponte*. Defendant argues that a trial court may not address what it perceives as a discriminatory use of peremptory challenges unless the issue is raised by one of the parties. Although the State cites several cases in which it was noted that the trial court raised a *Batson* issue *sua sponte*,[1] none of these cases addressed the preliminary question of whether the trial court had the right to raise the issue.

In *McCollum*, the Supreme Court followed the analysis of third-party standing that it first applied to jury selection in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In *Powers*, the issue before the Court was whether a white defendant had the right to assert a *Batson* violation based on the exclusion of African-Americans from the jury. In both cases the Supreme Court used a three-part test for third-party standing. The Supreme Court held that a litigant can raise a claim on behalf of a third party, if the litigant can demonstrate that: (1) he has suffered a concrete injury; (2) he has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect

---

[1] *See People v. Beard*, 263 Ill.App.3d 1077, 201 Ill.Dec. 226, 636 N.E.2d 658 (1993); *People v. Williams*, 252 Ill.App.3d 704, 192 Ill.Dec. 599, 625 N.E.2d 754 (1993), *rev'd on other grounds* 165 Ill.2d 51, 208 Ill.Dec. 341, 649 N.E.2d 397 (1995); *People v. Harvey*, 209 Ill.App.3d 733, 154 Ill.Dec. 381, 568 N.E.2d 381 (1991).

its own interests. *McCollum*, 505 U.S. at 55, 112 S.Ct. at 2357, 120 L.Ed.2d at 49, citing *Powers*, 499 U.S. at 411, 111 S.Ct. at 1370-1371, 113 L.Ed.2d at 425. The *McCollum* Court ultimately concluded that a prosecutor acting on behalf of the State has standing to raise a *Batson* claim on behalf of the excluded jurors. *McCollum*, 505 U.S. at 56, 112 S.Ct. at 2357, 120 L.Ed.2d at 50. In the case before us, we must reexamine the three-part analysis used in *McCollum* to determine whether it remains valid when the party acting on behalf of the excluded juror is the trial court rather than the prosecutor.

The first prong of the analysis considers whether the litigant has suffered a concrete injury. In *Powers*, the Supreme Court held that a defendant suffers an injury as the result of discriminatory jury selection practices because the practice casts doubt on the integrity of the judicial process. *Powers*, 499 U.S. at 411, 111 S.Ct. at 1371, 113 L.Ed.2d at 425. The Court observed: "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed *the court* to adhere to the law throughout the trial of the cause." (Emphasis added.) *Powers*, 499 U.S. at 412, 111 S.Ct. at 1371, 113 L.Ed.2d at 426. The *McCollum* court held that the State as represented by the prosecutor suffers a similar injury when the fairness and integrity of the judicial process is undermined. *McCollum*, 505 U.S. at 56, 112 S.Ct. at 2357, 120 L.Ed.2d at 49. We believe that if the parties suffer injury as a result of actions that undermine the fairness of the judicial process, the trial judge, who presides over the trial, must suffer an equal or greater injury. In fact, when considering whether a defendant's use of peremptory challenges constitutes state action, the *McCollum* court observed: "Regard-

less of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that *the court* has excused jurors based on race, an outcome that will be attributed to the State." (Emphasis added.) *McCollum*, 505 U.S. at 53, 112 S.Ct. at 2356, 120 L.Ed.2d at 47. If a defendant and the State, as represented by the prosecutor, are injured because racially discriminatory jury selection practices might be attributed to the State, as an act of the trial court, the clear implication is that the trial court, itself, has suffered an injury as great or greater than that suffered by the parties.

The second prong of the standing test considers whether the litigant has a close relation to the third party. In *McCollum*, the Supreme Court held that the State, acting through the prosecutor, is the representative of all the people and "the logical and proper" party to assert the rights of excluded jurors. *McCollum*, 505 U.S. at 56, 112 S.Ct. at 2357, 120 L.Ed.2d at 49. We believe that the trial court has a similar obligation to respect the rights of anyone that comes before it whether a litigant, witness, or juror. Further, we believe that the relationship between the trial court and the jury is even closer than the relationship between the parties and the jury. The trial court and the jury are the only participants in the trial duty bound to act impartially, and the jury relies on the trial court for its instructions regarding the law. Moreover, as we noted above, the use of peremptory challenges in a discriminatory fashion is likely to be interpreted as an act of the trial court regardless of who initiates the challenge. Accordingly, we conclude that the trial court also has a sufficiently close relationship to the jurors to raise a claim of discrimination on their behalf.

The final prong of the third-party standing analysis considers the third party's ability to protect its own interests. In *Powers*, the Supreme Court described the barriers to a suit by a prospective juror as daunting. *Powers*, 499 U.S. at 414, 111 S.Ct. at 1373, 113 L.Ed.2d at 427. In *McCollum* the Supreme Court held that the barriers identified in *Powers* were no less formidable when the discriminatory action is initiated by a criminal defendant. *McCollum*, 505 U.S. at 56, 112 S.Ct. at 2357, 120 L.Ed.2d at 49-50. Defendant argues that the barriers identified in *Powers* and *McCollum* are not applicable in the case before us because the defendant or the State, through the prosecutor, can raise a *Batson* challenge on the juror's behalf. We find this argument unpersuasive. First, in any particular case, the jurors' rights are guarded by only one of these parties. Surely, no litigant would make a peremptory challenge and then object to its own challenge on the basis that it was discriminatory. Second, we are asked to consider the ability of the juror to assert his or her own rights. Although the State, acting through the prosecutor, may assert a *Batson* violation on a juror's behalf, if the State fails to act, a juror has no ability to require, or even request, that the prosecutor do so. Accordingly, we determine that the barriers identified in *Powers* and *McCollum* are equally formidable in the situation presented by the case at bar. Therefore, we conclude that the trial court has standing to act on behalf of a juror subject to discriminatory jury selection practices.

Defendant argues that allowing a trial court to raise a *Batson* challenge *sua sponte* is improper because it places the trial court in the position of an advocate. See *People v. Bedenkop*, 252 Ill.App.3d 419, 192 Ill.Dec. 163, 625 N.E.2d 123 (1993). We disagree.

A trial court should not abandon its impartial role and assume the position of prosecutor. However, we do not find that the trial court does so when it raises a reverse-*Batson* challenge. When the trial court does so, it is acting on behalf of the excluded juror and is protecting the integrity of the judicial system itself. As long as the trial court responds equally to discriminatory jury selection practices whether committed by the defendant or the State, it has not violated its obligation to act fairly and impartially. Moreover, we believe that there is less danger of the trial court abandoning its impartial role because in Illinois trial courts have traditionally taken a far greater role during jury selection than during the other phases of a trial. See Supreme Court Rule 234 (177 Ill.2d R. 234)(requiring the trial court to conduct *voir dire* questioning of jurors and acquaint prospective jurors with the general duties and responsibilities of jurors).

Although defendant argues that our opinion will likely be misconstrued, we find that the path upon which we embark today is not as slippery as defendant warns. However, for the benefit of those reading this opinion in the future we feel compelled to state that, although a trial court has a *right* to raise *Batson* objections *sua sponte* there is no corresponding *duty* to do so, and a defendant who fails to timely object to a prosecutor's challenges *cannot avoid waiver* by arguing that the trial court had a *duty* to question the prosecutor's motives. This is precisely the formulation adopted by our supreme court when it held that a trial court has the *discretion* to remove a juror for cause *sua sponte* but that it has no *duty* to do so. See *People v. Metcalfe*, 202 Ill.2d 544, 557, 270 Ill.Dec. 69, 782 N.E.2d 263 (2002). We conclude that the trial court could

properly raise the reverse-*Batson* challenge to defendant's use of peremptory challenge against juror Gomez.

As to the substance of defendant's reverse-*Batson* contention, defendant argues that the trial court erred when it required defense counsel to articulate a reason for his peremptory challenge because a *prima facie* case of discrimination had not been established. The trial court stated that it was raising the *Batson* issue because Gomez was the second African-American woman peremptorily challenged by defendant. Defendant argues *inter alia* that combined race-gender discrimination cannot form the basis for a *prima facie* case of discrimination. See *People v. Washington*, 257 Ill.App.3d 26, 34, 194 Ill.Dec. 854, 628 N.E.2d 351 (1993). However, we need not consider whether combined race-gender discrimination can be used to establish a *prima facie* case under *Batson*. Our supreme court has clearly held that once the trial court rules on the ultimate question of discrimination the question of whether a *prima facie* case had been established is moot. *People v. Hudson*, 157 Ill.2d 401, 427-28, 193 Ill.Dec. 128, 626 N.E.2d 161 (1994).

The dissent accuses the trial court of collapsing the three-step *Batson* procedure and argues that this matter should be remanded for a hearing on whether a *prima facie* case existed. We disagree. Although we rely on *Hudson* in reaching the determination that the issue of whether a *prima facie* case was established was moot, the dissent responds by attempting to distinguish *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). We are aware that in *Hernandez* the Supreme Court based its holding on the fact that the State responded to a

Batson challenge without prompting from the trial court, while in the case before us the trial court requested that defendant present a race-neutral basis for his peremptory challenge. However, by limiting its analysis to the *Hernandez* case, the dissent ignores more than a decade of Illinois case law that has considered and rejected the analysis the dissent now applies.

In *Hudson*, our supreme court considered the State's argument that the existence of a *prima facie Batson* violation was not moot because it had responded with a race-neutral reason only in response to the trial court's prompting. See *Hudson*, 157 Ill.2d at 427, 193 Ill.Dec. 128, 626 N.E.2d 161. The *Hudson* court rejected the argument and considered only the propriety of the trial court's ultimate finding regarding intentional discrimination. *Hudson*, 157 Ill.2d at 428, 193 Ill.Dec. 128, 626 N.E.2d 161. More recently this court has applied the *Hudson* decision holding, in clear language, "in a case involving a reverse-*Batson* claim by the State, the question of whether the State has sufficiently demonstrated a *prima facie* case becomes moot once the trial court rules on the ultimate issue of discrimination irespective of whether the defendant volunteers explanations for his challenges or is prompted by the trial court to do so." *People v. Rivera*, 307 Ill.App.3d 821, 830, 241 Ill.Dec. 293, 719 N.E.2d 154 (1999). Our research has revealed dozens of cases following the *Hudson* analysis. See, *e.g.*, *People v. Haggard*, 332 Ill.App.3d 46, 265 Ill.Dec. 458, 772 N.E.2d 829 (2002). However, we see no point in cluttering the text of this opinion or burdening the reader with a lengthy string citation that would add little to our analysis. On the other hand, our research has discovered only one published case, decided after *Hudson*, that inter-

preted *Hernandez* as the dissent proposes and considered whether a *prima facie* showing of discrimination was made after the trial court ruled on the ultimate issue of purposeful discrimination. See *People v. Washington*, 272 Ill.App.3d 913, 916 n. 1, 209 Ill.Dec. 447, 651 N.E.2d 625 (1995). However, we consider this case an aberration because, like the dissent, the *Washington* court looked solely to *Hernandez* and failed to address the holding of *Hudson*. Therefore, we continue to hold, like the great majority of Illinois courts, that any issue related to the first stage of the *Batson* analysis was moot.

Moreover, we observe, as a practical matter, that because the trial court's determination is based on its own observations the first stage of the *Batson* inquiry will necessarily collapse. If a trial court observes an apparent *Batson* violation, we believe that it may proceed immediately to the second stage of the inquiry. Unlike the dissent, we would not impose on trial courts the obligation of engaging in a meaningless rhetorical exercise in which they would first articulate the basis for the perceived *Batson* violation and then announce that they have been persuaded by their own arguments. Of course, we do not intend to imply that a trial court cannot, in the exercise of its discretion, state the basis of its findings for the record or that, in a close case, the trial court is precluded from requesting that the parties present arguments regarding the existence of a *prima facie* case. However, we do not believe that the trial court is under any obligation to adopt either approach. Admittedly, allowing a trial court to *sua sponte* raise a *Batson* issue creates the potential for abuse. However, we are confident that the trial courts in this State will exercise their discretion responsibly. Unlike the dissent, we do not believe that mindless

adherence to the three-step analysis of *Batson* is necessary to ensure that they do so.

We turn then to the question of whether the trial court erred when it determined that defendant's use of a peremptory challenge constituted purposeful discrimination. The trial court's determination as to discriminatory intent is a finding of fact entitled to great deference, and we will disturb that determination on review only if it is clearly erroneous. See *Harris*, 206 Ill.2d at 17, 276 Ill.Dec. 419, 794 N.E.2d 314.

Defense counsel indicated that he used a peremptory challenge against Gomez because she worked at Cook County Hospital and he believed that her experience with gunshot victims would prejudice her against defendant. The trial court was called upon to weigh the credibility of defense counsel's explanation. In this case, the victim was African-American, and the victim's mother, an African-American woman, was expected to testify. Defense counsel's use of peremptory challenges against female African-American jurors raises the inference that defense counsel was motivated by the constitutionally impermissible belief that African-American women on the jury would react sympathetically to testimony from the victim's African-American mother. Accordingly, the trial court could rationally find a motive to discriminate against African-Americans, women, or both groups simultaneously. The validity of the proffered explanation was significantly weakened because Gomez testified that she works in a business office at the hospital and in a building physically separated from the emergency department where gunshot victims are admitted to the hospital. The credibility of defense counsel's explanation was further weakened when

defense counsel admitted that he was striking Gomez because she was a woman, even though defense counsel described this clear act of gender discrimination as an attempt to "balance" the jury. Therefore, we conclude that the trial court's determination that defense counsel was engaged in purposeful discrimination was not manifestly erroneous, and the trial court did not err when it seated Gomez as a juror over defendant's objection.

Defendant next contends that the imposition of an extended-term sentence violated the rule announced in *Apprendi*. The trial court based the imposition of an extended term sentence on its finding that defendant was a leader of an organized gang pursuant to sections 5-8-2 and 5-5-3.2(b)(8) of the Unified Code of Corrections (730 ILCS 5/5-8-2, 5-5-3.2(b)(8) (West 1998)). Section 5-5-3.2(b)(8) authorizes an extended term sentence:

> "When a defendant is convicted of a felony other than conspiracy and the court finds that the felony was committed under an agreement with 2 or more other persons to commit that offense and the defendant, with respect to the other individuals, occupied a position of organizer, supervisor, financier, or any other position of management or leadership, and the court further finds that the felony committed was related to or in furtherance of the criminal activities of an organized gang or was motivated by the defendant's leadership in an organized gang." 730 ILCS 5/5-5-3.2(b)(8) (West 1998).

The trial court found that defendant was the "chief enforcer" of the gang and that he was eligible for an extended term sentence under section 5-5-3.2(b)(8). Defendant argues that this finding by the trial court

violated his right to have the jury determine facts that could increase the maximum penalty to which he was subject.

The rule announced in *Apprendi* can be summarized in a simple statement: "due process requires that all facts necessary to establish the statutory sentencing range within which the defendant's sentence falls must be proven to a jury beyond a reasonable doubt." *People v. Swift*, 202 Ill.2d 378, 383, 269 Ill.Dec. 495, 781 N.E.2d 292 (2002). At the trial level, and in its brief on appeal, the State argued that defendant's extended-term sentence did not violate the *Apprendi* rule because the maximum penalty for murder in Illinois is death. However, after the State filed its brief in this case, our supreme court resolved the issue and held that the sentencing range for first degree murder in Illinois is 20 to 60 years' imprisonment, and that, in order to comply with *Apprendi*, any factual findings which take a sentence beyond that range must be proven to a jury beyond a reasonable doubt. *Swift*, 202 Ill.2d at 392, 269 Ill.Dec. 495, 781 N.E.2d 292. At oral argument, the State abandoned its argument regarding the sentencing range for first degree murder and focused its arguments instead on whether the *Apprendi* error in this case constituted harmless error.

In accordance with *Swift*, we find that the sentencing range for murder in Illinois is 20 to 60 years. See *Swift*, 202 Ill.2d at 392, 269 Ill.Dec. 495, 781 N.E.2d 292. Accordingly, the failure to submit to the jury the question of whether defendant held a leadership position in an organized gang within the meaning of section 5-5-3.2(b)(8) violated the rule announced in *Apprendi*. See *Swift*, 202 Ill.2d at 392, 269 Ill.Dec. 495, 781 N.E.2d 292. Therefore, the

question before us is whether this *Apprendi* violation constituted reversible error. In *People v. Thurow*, 203 Ill.2d 352, 272 Ill.Dec. 185, 786 N.E.2d 1019 (2003), our supreme court recently emphasized that an *Apprendi* violation is not *per se* a reversible error and that an *Apprendi* violation may be subject to a plain-error or harmless-error analysis. *Thurow*, 203 Ill.2d at 363, 272 Ill.Dec. 185, 786 N.E.2d 1019.

Although the plain-error and harmless-error analyses are similar, they differ significantly in their imposition of the burden of persuasion. *Thurow*, 203 Ill.2d at 363, 272 Ill.Dec. 185, 786 N.E.2d 1019. The harmless-error analysis applies when a defendant has made a timely objection, and the State bears the burden of persuasion with respect to prejudice. *Thurow*, 203 Ill.2d at 363, 272 Ill.Dec. 185, 786 N.E.2d 1019. "In other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Thurow*, 203 Ill.2d at 363, 272 Ill.Dec. 185, 786 N.E.2d 1019. The plain-error analysis applies when a defendant fails to make a timely objection, and the defendant bears the burden of persuasion with respect to prejudice. *Thurow*, 203 Ill.2d at 363, 272 Ill.Dec. 185, 786 N.E.2d 1019. In other words, a reviewing court may not correct an error that would otherwise be forfeited unless the defendant can demonstrate prejudice as a result of the error. *Thurow*, 203 Ill.2d at 363, 272 Ill.Dec. 185, 786 N.E.2d 1019.

In the case before us, defendant raised the *Apprendi* issue at the trial level. Accordingly, we will review the State's arguments against the harmless-error standard. We believe that there can be little doubt that the State proved most of the elements of section 5-5-3.2(b)(8). The crime was clearly gang

related. The crime also clearly involved an agreement between defendant and two or more other persons. The two gang members that accompanied defendant when he left the van were certainly part of the agreement, and the agreement may also have included the gang members who helped defendant obtain the weapon or hid the weapon after the crime. We believe the key question is whether defendant occupied a position of management or leadership.

The State presented uncontested evidence that defendant was the "chief enforcer" of the gang. We believe that, in conjunction with the evidence of defendant's conduct during the shooting, no rational jury could find that "chief enforcer" was not a position of management or leadership within the gang. See *Thurow*, 203 Ill.2d at 369, 272 Ill.Dec. 185, 786 N.E.2d 1019. Although the State did not elicit testimony detailing the full organizational structure of the gang, it did present evidence that the "soldiers" in the gang were required to follow orders and could be "violated" if they failed to do so. The State presented additional evidence that defendant held a title in the gang and gave orders to the soldiers that were with him. We may not have evidence of the relationship between a "chief enforcer" and other gang leaders, but the State presented uncontested and overwhelming evidence that defendants [sic] position as chief enforcer placed him in a leadership position somewhere above the soldiers in the gang. Therefore, we conclude that the *Apprendi* violation in this case constituted harmless error.

Defendant finally contends that the imposition of an extended term sentence in this case violated his right to a jury trial as guaranteed by the Illinois constitution. Defendant argues that this right is

broader than that guaranteed by the federal constitution and, unlike an *Apprendi* violation, such a violation is not subject to a harmless error analysis. The harmless error analysis used in *Thurow*, was based on United States Supreme Court precedents interpreting the right to a jury trial guaranteed by the federal constitution. We have carefully considered defendant's arguments and recognize that, if we find that the Illinois constitution provides greater protection than the federal constitution, we are not bound to follow the Supreme Court in lockstep. See *Thurow*, 203 Ill.2d at 375, 272 Ill.Dec. 185, 786 N.E.2d 1019 (Freeman, J., concurring). However, we find nothing in defendant's discussion of the history of criminal defendants' right to a jury trial in Illinois that compels us to break lockstep and conclude that the harmless error analysis of *Thurow* is impermissible under the Illinois constitution. Moreover, because we believe that a detailed discussion of defendant's Illinois constitution argument would do little more than recapitulate the arguments already adequately set forth in *Apprendi* and its progeny, we have elected to dispose of this contention without lengthy discussion. Therefore, we conclude that any violation of the right to a jury trial guaranteed by the Illinois constitution was harmless for the same reasons discussed above in regard to defendant's right to a jury trial under the federal constitution.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

GALLAGHER, J., specially concur, and FROSSARD, P.J., dissents. GALLAGHER, J., specially concurring.

I concur in the judgment. I also concur with regard to the trial court's raising of the *Batson* issue *sua sponte*. While I agree with the dissent that the three-step process articulated in *Batson* should be followed, I believe that occurred here. Although the trial court did not expressly state so, it is inferable that the court believed that a *prima facie* case was established when defense counsel excluded a second African-American. While it is arguable that the excusal did not constitute a pattern of strikes against African-Americans, since defense counsel also excused a white male and a white female, *Batson* requires that the relevant circumstances raise an *inference* of purposeful discrimination. To the trial court, such an inference was raised. Whether one agrees or disagrees is not the point. The point is that step one of the *Batson* process was followed.

The trial court rightfully rejected defense counsel's articulated reason that Mrs. Gomez worked at Cook County Hospital and thus would be in a position to observe gunshot victims. Mrs. Gomez made it clear that she worked in the business office of a clinic affiliated with the hospital but which was located in a separate building. After additional *voir dire*, defense counsel sought to excuse Mrs. Gomez because counsel wanted fewer women on the jury, and the court also was correct in rejecting that reason. In my view, although this was a novel presentation of the issue, the integrity of the *Batson* three-step process was preserved and therefore, I concur in the judgment.

Presiding Justice FROSSARD, dissenting.

I agree with the majority's conclusion that the trial court has the power to *sua sponte* raise a reverse-*Batson* challenge when it is necessary to prevent discrimination. *Batson* and its progeny recognize that potential jurors, as well as litigants, have an equal protection right to jury selection procedures free from discrimination. It is within the discretion of the trial courts to manage and control the administration of justice, including intervening to protect this equal protection right of potential jurors, as well as litigants, by *sua sponte* raising a *Batson* challenge. See *People v. Beard*, 263 Ill.App.3d 1077, 1081, 201 Ill.Dec. 226, 636 N.E.2d 658 (1993) (where trial court raised *Batson* question *sua sponte*, defendant was not obligated to have raised the issue); *People v. Williams*, 252 Ill.App.3d 704, 712-13, 192 Ill.Dec. 599, 625 N.E.2d 754 (1993) (trial court may *sua sponte* call *Batson* hearing), *rev'd on other grounds*, 165 Ill.2d 51, 208 Ill.Dec. 341, 649 N.E.2d 397 (1995) (affirming trial court); *People v. Harvey*, 209 Ill.App.3d 733, 743, 154 Ill.Dec. 381, 568 N.E.2d 381 (1991) (noting that the trial court raised the *Batson* issue *sua sponte*); *People v. Whaley*, 184 Ill.App.3d 459, 470, 132 Ill.Dec. 681, 540 N.E.2d 421 (1989) (Rizzi, J., specially concurring), quoting *People v. Andrews*, 172 Ill.App.3d 394, 402, 122 Ill.Dec. 369, 526 N.E.2d 628 (1988) (trial court "'cannot sit idly by'" and become accomplice to discrimination in jury selection). The exclusion of even one minority person from the jury venire based on race is unconstitutional. *People v. Andrews*, 155 Ill.2d 286, 294, 185 Ill.Dec. 499, 614 N.E.2d 1184 (1993). Moreover, *Batson* does not require a complete exclusion of a racial group to prove discrimination. *People v.*

Johnson, 159 Ill.App.3d 991, 996, 112 Ill.Dec. 243, 513 N.E.2d 852 (1987).

When, however, as in the instant case, the trial court *sua sponte* raises a reverse-*Batson* challenge, the court should adhere to the three-step process articulated in *Batson*. That process was not followed here. In *Batson*, the United States Supreme Court set forth a three-step analysis for establishing whether the State exercised its peremptory challenges in a racially discriminatory manner. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87-88. That three-step analysis is equally applicable to a reverse-*Batson* challenge raised *sua sponte* by a trial court. First, a *prima facie* case of purposeful discrimination in jury selection must be demonstrated; second, if a *prima facie* case is demonstrated, the burden shifts to the party challenging the juror to articulate a race-neutral reason for challenging the juror; and third, the trial court considers those reasons and decides whether purposeful discrimination has been demonstrated. See *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1723-24, 90 L.Ed.2d at 87-89. Contrary to the three-step analysis provided by the United States Supreme Court in *Batson*, the trial court, in the instant case, collapsed what ought to be a three-step procedure into an undifferentiated review of the jury selection process. See *People v. Crockett*, 314 Ill.App.3d 389, 397, 247 Ill.Dec. 50, 731 N.E.2d 823 (2000).

Regarding the *prima facie* case, which is the first stage of the three-step procedure under *Batson*, our supreme court has recognized several relevant circumstances to be examined in determining whether a *prima facie* case of discriminatory jury selection has been established, including the following: (1) racial identity between defendant and the excused venire

persons; (2) a pattern of strikes against African-American persons; (3) a disproportionate use of peremptory challenges against African-American persons; (4) the level of African-Americans represented in the venire as compared to the jury; (5) counsel's questions and statements during *voir dire* and while exercising peremptory challenges; (6) whether the excluded African-American venire persons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. *People v. Williams*, 173 Ill.2d 48, 71, 218 Ill.Dec. 916, 670 N.E.2d 638 (1996). In the instant case, the record fails to reflect that the trial court examined these relevant circumstances.

The trial court did not articulate any evidence that defense counsel had engaged in purposeful discrimination, other than the fact that Mrs. Gomez would have been the second African-American female excused by the defense. Defense counsel had accepted one African-American female, Elma Starks, had excused another woman, Rosalee Huizanga, and had excused a white male, Thomas Hickey. The critical element of a *prima facie* case has been recognized to be whether the fact of removal and any other relevant circumstances raise an inference of purposeful discrimination. See *People v. Williams*, 147 Ill.2d 173, 220, 167 Ill.Dec. 853, 588 N.E.2d 983 (1991). The trial court completely eliminated step one and failed to make a record demonstrating a *prima facie* case of purposeful discrimination in jury selection. In *People v. Davis*, 345 Ill.App.3d 901, 911, 281 Ill.Dec. 110, 803 N.E.2d 514 (2004), the same trial judge improperly collapsed step one and step three of the *Batson* analysis.

The State relies on *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), in support of the argument that the question of whether a *prime facie* case under *Batson* was established is moot because the defense counsel in the instant case submitted an explanation for his exercise of peremptory challenges. Based on that argument, the State contends that it is unnecessary for us to determine whether the existence of a *prima facie* case of discrimination has been demonstrated. *Hernandez* is distinguishable. Unlike *Hernandez*, in the instant case, the trial judge *sua sponte* raised a reverse-*Batson* challenge. As noted in *Hernandez*, the *prima facie* case analysis is rendered moot when a neutral reason is offered "without any prompting or inquiry from the trial court." *Hernandez*, 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 405. In the instant case, explanations were offered by defense counsel in response to the trial court's direct inquiry. After the trial court *sua sponte* raised the reverse-*Batson* challenge, the trial court questioned defense counsel's decision to excuse Mrs. Gomez by asking, "Counsel, would you kindly articulate a basis of why you are excusing Mrs. Gomez?" Defense counsel's explanations were offered in direct response to the trial court's question.

The Illinois Supreme Court in *People v. Hudson*, 157 Ill.2d 401, 427-28, 193 Ill.Dec. 128, 626 N.E.2d 161 (1993), extended the ruling in *Hernandez* and held that the *prima facie* issue is rendered moot once the trial court rules on the legitimacy of counsel's explanations regardless of whether the State had or had not been prompted by the trial court to proffer its reasons. The majority relies on *Hudson* for the proposition that where race-neutral reasons are given for the peremptory challenge, even if prompted by the

trial court, the *prima facie* issue is rendered moot. *Hudson*, 157 Ill.2d at 427-28, 193 Ill.Dec. 128, 626 N.E.2d 161. The majority asserts that only one published case decided after *Hudson* has held that where the trial court prompts the giving of race-neutral reasons, the issue of a *prima facie* showing is not rendered moot. See *People v. Washington*, 272 Ill.App.3d 913, 916 n. 1, 209 Ill.Dec. 447, 651 N.E.2d 625 (1995). However, *Hudson* is not determinative in the factual context of this case, where a trial judge *sua sponte* raised a reverse-*Batson* violation and bypassed any determination of a *prima facie* case by requesting race-neutral explanations from defense counsel for his peremptory challenge.

Neither *Hudson* nor any of the cases following *Hudson* have addressed the issue of whether trial court prompting or inquiry resulting in counsel giving explanations for the use of peremptory challenges renders the existence of a *prima facie* case moot in the context of a reverse-*Batson* challenge made *sua sponte* by the trial judge. The majority relies on *People v. Rivera*, 307 Ill.App.3d 821, 830, 241 Ill.Dec. 293, 719 N.E.2d 154 (1999), as an example of a recent reverse-*Batson* case applying the *Hudson* ruling that the existence of a *prima facie* case becomes moot once explanations are given regardless of whether defendant volunteers explanations or is prompted by trial court inquiry. However, *Rivera* did not address the *prima facie* issue in the context of a reverse-*Batson* challenge made *sua sponte* by the trial judge. In *Rivera*, the State, not the trial court, raised the reverse-*Batson* challenge.

The trial court, by *sua sponte* raising the reverse-*Batson* challenge and then requesting explanations from defense counsel for his peremptory challenge,

bypassed the *prima facie* issue and deprived defense counsel of an opportunity to offer input regarding the *prima facie* case. That process precluded defense counsel from challenging the existence of a *prima facie* case of purposeful racial discrimination. In the context of the instant case, a factual record demonstrating the existence of a *prima facie* case of discrimination is of particular importance to enable the reviewing court to determine whether the court's decision to *sua sponte* raise and declare a reverse-*Batson* violation was justified. Reverse-*Batson* violations are rare, and even more unusual is the fact that the alleged reverse-*Batson* violation was raised not by a party, but by the trial judge, *sua sponte*. My research has revealed no Illinois case where a trial court raised *sua sponte* a reverse-*Batson* challenge. The trial judge's failure to make a record of the *prima facie* case regarding this uncommon *sua sponte* reverse-*Batson* challenge makes proper review of the *Batson* ruling impossible.

The majority fails to address defendant's argument that *Batson* is not applicable to combined race-gender discrimination. When the trial judge *sua sponte* raised the reverse-*Batson* challenge, the judge expressed concern about the fact that Mrs. Gomez was "the second African-American female that the defense has sought to exclude." Relying on *Hudson*'s conclusion that establishing a *prima facie* case becomes moot once the trial court rules on the ultimate issue of discrimination, the majority dismisses the defendant's argument that *Batson* is not applicable to combined race-gender discrimination. However, *Hudson* never addressed whether *Batson* is applicable to combined race-gender discrimination. The Illinois Supreme Court has held that the focus of *Batson* is on the exclusion of members of a single

identifiable group, not of different groups considered together. *People v. Harris*, 164 Ill.2d 322, 344, 207 Ill.Dec. 400, 647 N.E.2d 893 (1994). However, the Illinois Supreme Court has not specifically addressed the question of whether *Batson* is applicable to combined race-gender discrimination. In *People v. Washington*, 257 Ill.App.3d 26, 34, 194 Ill.Dec. 854, 628 N.E.2d 351 (1993), the appellate court upheld the trial court's ruling that the defendant, who had asserted that certain jurors were stricken by the State because they were "black males," had failed to make the requisite *prima facie* showing, and stated it did not believe *Batson* applied to alleged combined race-gender discrimination. In *Rivera*, a case relied upon by the majority, the court, in addressing the issue of combined "race-gender" discrimination, claims that "this court has previously found such challenges impermissible under *Batson*." *Rivera*, 307 Ill.App.3d at 829, 241 Ill.Dec. 293, 719 N.E.2d 154.

In the instant case, the trial court's failure to articulate the circumstances that demonstrate a *prima facie* case of purposeful discrimination leaves unanswered the question of whether the court's finding a *Batson* violation was based on combined race-gender discrimination. The trial judge, by collapsing the *Batson* stages and failing to make findings of fact to clarify the record regarding the relevant circumstances demonstrating a *prima facie* case of purposeful discrimination, has made proper review of this race-gender issue impossible.

For the trial court to *sua sponte* raise and resolve a reverse-*Batson* claim requires adherence to the three-step process articulated in *Batson* together with the following: (1) balancing the trial court's discretion to manage and control proceedings before it and to

supervise *voir dire*; (2) demonstrating impartiality by not assuming an adversarial role; (3) recognizing the role of the peremptory challenge in the jury selection process; and (4) guarding the equal protection right of potential jurors, as well as litigants, to jury selection free from discrimination.

While the trial court properly raised the reverse-*Batson* challenge, the trial court failed to follow the three-step process articulated in *Batson* in resolving that challenge. Step one of the *Batson* process, a *prima facie* case of purposeful discrimination in jury selection, was not addressed by the trial judge. The trial judge, by raising the reverse-*Batson* challenge *sua sponte* without making a record of the *prima facie* case of discrimination, eliminated examination of the circumstances demonstrating a *prima facie* case of purposeful discrimination. The *sua sponte* reverse-*Batson* challenge followed by the trial judge requesting defense counsel to provide explanations for using his peremptory challenge precluded defense counsel from challenging the existence of a *prima facie* case. Defense counsel had no opportunity to challenge the existence of a *prima facie* case because the trial judge had bypassed that issue when he asked defense counsel for race-neutral explanations. Eliminating step one collapsed what ought to be a three-step process into an undifferentiated review of the jury selection process.

In the context of the reverse-*Batson* challenge raised *sua sponte* by the trial judge, mindful, not mindless, adherence to the three-step *Batson* analysis is necessary to allow defense counsel the opportunity to challenge the existence of a *prima facie* case. A mindful, not mindless, adherence to the three-step *Batson* analysis is necessary to provide the

reviewing court a fully developed record to determine whether the circumstances articulated by the Illinois Supreme Court in *Williams* demonstrate the existence of a *prima facie* case. A mindful, not mindless, adherence to the three-step *Batson* analysis is necessary to determine whether the court's finding of a *Batson* violation was based on combined race-gender discrimination, and if so, to determine whether *Batson* applies to alleged combined race-gender discrimination.

We should retain jurisdiction (*People v. Garrett*, 139 Ill.2d 189, 194, 151 Ill.Dec. 329, 564 N.E.2d 784 (1990)) while remanding for a three-step *Batson* hearing on the present record and any additional record the trial court or parties decide to make for the purpose of determining the *Batson* issue. Regarding the first step of the three-part process, the trial court should examine the relevant circumstances as previously discussed in this dissent and articulated by the Illinois Supreme Court in *Williams* to determine whether defendant has engaged in a *prima facie* case of discriminatory jury selection. If a *Batson* violation is found, the trial court should further clarify whether the *Batson* violation is based on combined-race gender discrimination.

SUPREME COURT OF ILLINOIS

No. 98609

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

MICHAEL RIVERA,
Appellant.

May 18, 2006.
Modified on Denial of Rehearing June 29, 2006.

Justice KARMEIER delivered the judgment of the court, with opinion:

The defendant, Michael Rivera, was charged in the circuit court of Cook County with two counts of first degree murder. Following a jury trial, the defendant was found guilty and was subsequently sentenced to 85 years' incarceration in the Illinois Department of Corrections. Defendant appealed, arguing that (1) the trial court erred when it *sua sponte* raised a reverse-*Batson* (see *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)) challenge to his use of a peremptory challenge during jury selection, (2) the procedure resulting in the imposition of his extended-term sentence violated the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and (3) the procedure resulting in the imposition of his extended-term sentence violated his right to a jury trial as guaranteed by the Illinois Constitution. A divided appellate panel re-

jected those contentions and affirmed defendant's conviction and sentence. 348 Ill.App.3d 168, 284 Ill.Dec. 476, 810 N.E.2d 129. We granted the defendant's petition for leave to appeal. 177 Ill.2d R. 315.

On appeal, defendant advances multiple arguments, all of which are merely facets of the same *Batson* and *Apprendi* arguments defendant raised below. Specifically, defendant submits that (1) trial judges do not have third-party standing to raise *Batson* challenges *sua sponte;* (2) the trial court's *sua sponte Batson* challenge to defense counsel's peremptory strike of juror Deloris Gomez was incompatible with the three-step *Batson* process; (3) the trial court erred in proceeding to the second step of the *Batson* process where no inference of a *prima facie* case of discrimination had been established; (4) the trial judge erred in his ultimate determination that defense counsel discriminated against juror Gomez; (5) the trial court's improper denial of defense counsel's peremptory strike of juror Gomez was reversible error; (6) the trial court's "violation of state statutory and constitutional guarantees to jury trial" are not amenable to harmless-error review; (7) *Apprendi* violations are not subject to harmless-error review; and (8) *Apprendi* violations in this case are not harmless beyond a reasonable doubt. Defendant's individual contentions will be addressed, as warranted, in the context of the broader *Batson* and *Apprendi* issues he has raised. We will set forth only those facts pertinent to the issues defendant has raised.

BACKGROUND

During jury selection, defense counsel questioned juror Deloris Gomez, a business office supervisor at Cook County Hospital's out-patient orthopedic clinic. In the course of that questioning, Gomez acknowl-

edged that Cook County Hospital is known for the treatment of gunshot victims and, as a part of her employment at the clinic, she has contact with patients, "checking them in." Gomez said her interaction with the victims of violent crime would not affect her ability to serve as a juror in the case. Following *voir dire,* and apparently in the presence of Gomez and other prospective jurors, defense counsel announced his intention to use his fourth peremptory challenge against Gomez, as the following excerpt from the transcript indicates:

> "MR. DECKER [Defense attorney]: Your Honor, with thanks, we would ask to excuse Mrs. Gomez.
>
> THE COURT: I'm going to ask you to remain, Mrs. Gomez. I'm going to ask counsel to join me, if the court reporter will join me, and the defendant will join me in chambers. Excuse me, ladies and gentlemen."

In chambers, the court directed defense counsel to "kindly articulate a basis of why you are excusing Ms. Gomez." Defense counsel protested, "The court has done it on its own motion *sua sponte.*" The trial court responded: "I will do it. It is the citizen's right to sit as a juror, and I will implicate myself *sua sponte* if I feel somebody's rights are being impinged upon * * *." Defense counsel then complied with the court's directive, responding:

> "Mrs. Gomez has a connection to a hospital that on a daily basis probably sees more gunshot victims than any other hospital in the world * * *. Given that fact that she's in the orthopedic section, I think on a daily basis even though she's a supervisor, even though she's not a rehabilitative

> nurse, she on a daily basis sees those victims who are victims of violent crime. For those reasons it constrains me. I know she has some kind of Hispanic connection given her name. I'm pulled in two different ways. For those reasons I asked that the–."

At that point in defense counsel's explanation, the trial court interrupted counsel, noting that "Mrs. Deloris Gomez appears to be an African-American." The court then asked to "hear from" the State on the issue, the prosecutor having been totally silent and uninvolved to that juncture. After some initial observations regarding the theory of the case and the issue for the jury's consideration, the prosecutor echoed the court's sentiment that the offered cause for excusing Gomez was insufficient. Defense counsel then noted that he had previously accepted an African-American woman to sit on the jury, and the court quickly pointed out that Gomez was the second African-American woman that the defense had sought to exclude. The court stated it was the articulated reason given for the peremptory challenge of Gomez that was of particular concern. The court concluded:

> "I've heard her answers to the questions. I've looked at her jury information form, and I'm quite frankly very much concerned, Counsel, as to why Mrs. Deloris is being excused–Mrs. Deloris Gomez is being excused. She works in a clinical division of this hospital. It may have a reputation of having many emergency cases, I presume, involving gunshot cases, but again she works in a business office, the very first line identifying her job.
>
> * * *

I did this *sua sponte* because I was concerned about the right of Mrs. Gomez to be a juror and participate. If the State in fact had done this, I certainly would have found they would have established a *prima facie* case by the very reason—what I'm going to do is allow Ms. Gomez—allow her to be seated, not excuse her on the basis of your peremptory.

I feel under these circumstances the reasons given by you, Mr. Decker, do not satisfy this Court. As far as I'm concerned, it's more than a *prima facie* case of discrimination against Mrs. Gomez. I'm not going to allow her to be excused. She will be seated as a juror over objection."

Defense counsel then asked for, and was granted, leave to conduct further questioning of Gomez, and noted defendant's objection of record. Further questioning of Gomez was conducted by defense counsel in chambers. Gomez again acknowledged the "great number of patients" who are seen in Cook County Hospital's emergency room "as a result of violent crimes"; however, Gomez pointed out that the clinic where she works is a separate building. Defense counsel's questioning of Gomez continued:

"MR. DECKER: But the individuals that are seen there at Fantus Clinic, I know they are not seen in the emergency room on an emergency room basis; you don't have the facilities there. It's mainly appointments that people are awaiting and people picking up medications. I believe there is a pharmacy also, I believe, there on the first floor?

JUROR GOMEZ: Yes, it is.

MR. DECKER: Certainly some of those victims are—certainly some of those patients were victims of gun violence?

JUROR GOMEZ: Yes, they were.

MR. DECKER: Does that fact set you off against my client as opposed to if he was charged with something else, you know, suppose if he was a defendant charged with theft or possessing a stolen motor vehicle, that's our concern?

JUROR GOMEZ: No, it does not. It does not affect me in that way.

MR. DECKER: Do you still feel you'd be able to fairly view the evidence and follow the instructions and the law that his Honor, Judge Fiala, will be giving you?

JUROR GOMEZ: Yes, I do."

With the conclusion of counsel's questioning, the trial court directed Gomez to resume her seat in the jury box. Subsequently, out of juror Gomez's presence, the trial court inquired of defense counsel whether counsel wished to say anything further. Counsel responded:

"Yes, your Honor. My feeling [*sic*] are still the same. I feel that I'm trying to modify the composition of this panel. I'm not trying to exclude a woman because of her race, but—strike that-not trying to excuse a juror because of her race. But also I think I can also factor in the fact that she would now be out of the—by the fact that the jury is predominantly women, I'm trying to get some impact from possibly other men in the case. I just don't feel that under these circumstances

> my client should be precluded from his reason to exercise a peremptory challenge."

Defense counsel asked the trial judge if he had ever been to Fantus Clinic, and the court advised counsel that the court could not comment on that. Defense counsel then told the court: "It's wall to wall victims and patients coming in there, and I could see it's a disturbing place for me to be there when I've been there."

The court concluded:

> "I had the opportunity to question Deloris Gomez who I find is a very intelligent lady. I considered her statements very carefully, her testimony very carefully, and I again feel that she shall sit as a juror. I shall not excuse her, and I will override your peremptory challenge as to Ms. Gomez, and I find no basis for cause. So Mrs. Gomez shall sit as a juror."

In view of the court's ruling as to Gomez, defense counsel asked to excuse "as [defendant's] fourth peremptory[,] Mr. Kurich." Inexplicably, the court responded as to *that* peremptory challenge, "With reluctance I will allow it."

When the evidentiary portion of defendant's trial commenced, the State presented evidence establishing that defendant shot and killed 16-year-old Marcus Lee, erroneously believing that Lee was a member of a rival gang. Defendant does not challenge the sufficiency of the evidence supporting his murder conviction, and he raises, as additional error, only an *Apprendi* issue; therefore, we set forth only the trial evidence pertinent to that issue.

At trial, the State called Susan Shelton, Miguel Rodriguez, and Charles Oberlin to testify regarding the events of January 10, 1998, the night of the murder. All three witnesses were former members of defendant's gang, the Insane Deuces.

Susan Shelton testified that she was with the defendant on the night of the murder. That evening, Shelton attended a party where defendant and several other members of the Insane Deuces were also in attendance. At some point in the evening, defendant, Shelton, Carlos Sanchez (also a gang member), and three others left the party in Sanchez's van, with Sanchez driving. While they were driving around defendant saw two persons walking down the street. Defendant identified those individuals as members of a rival gang. Defendant directed Sanchez to stop the van. Defendant then produced a gun and exited the van, but returned a few seconds later, instructing Sanchez to chase the two persons they had just seen. Shelton testified that they never saw those two individuals again that night, but defendant later noticed another individual on the street, and announced, "There go [*sic*] that pussy ass Stone from earlier." Shelton knew that the Insane Deuces and the Stones were rival gangs.

Defendant pointed his gun at Sanchez and ordered him to "stop the fucking van." When the van stopped, defendant exited the van, still holding the gun. Two other occupants followed. Defendant ran around the side of the van, and out of Shelton's sight. Shelton then heard gunshots. Defendant and the others returned to the van, with defendant still holding the gun. The two other individuals with defendant were yelling gang slogans until defendant told them to "shut the fuck up," advising them that he still had

"one bullet left." Defendant was the only person Shelton saw armed with a weapon that evening. After the shooting, defendant continued to direct the van's movements. At one point, defendant ordered the van to stop in an alley. Defendant unloaded the gun and handed the shell casings to Shelton. Defendant got out of the van with the gun and later returned without it. Shelton gave the shell casings to Sanchez, and he apparently disposed of them. Sanchez then took defendant and three other individuals back to the party. Shelton testified that she believed defendant to be the "chief enforcer" of the Insane Deuces, a gang position below the chief, or "jefa," and above the foot soldiers.

Miguel Rodriguez testified that he was a member of the Insane Deuces on January 9, 1998, and several members of the gang—including defendant—were at his home that evening. Between 8:30 and 9 p.m. that day, the group was notified that there were some "Stones" in a park near Rodriguez's home. The group, including defendant and a person named "Nelson," went to the park, where they saw some individuals playing basketball. Defendant began to "throw" gang signs, indicating his allegiance to the gang. When those playing basketball did not respond, the group returned to Rodriguez's home.

Back at Rodriguez's home, defendant referred to the individuals in the park as "pussies" because they were afraid to fight. Later that night, Rodriguez observed defendant in possession of two chrome revolvers. Thereafter, defendant began asking other gang members if they wanted to go with him to the projects. Defendant and other members of the gang left Rodriguez's home between 12:30 and 1 a.m. When Rodriguez next saw defendant it was approximately 3

a.m. At that time, defendant announced to Rodriguez that he was a "Stone killer," and he indicated he had shot someone that evening. Rodriguez identified Nelson as a "chief" of the gang, and defendant as the "chief enforcer." He explained that the role of the chief enforcer was to enforce the chief's decisions.

Charles Oberlin testified that he was a member of the Insane Deuces in January of 1998, and he knew defendant as the "chief enforcer" of that gang. Around 3 or 4 a.m. on January 10, 1998, Oberlin saw defendant in possession of a chrome gun, and defendant indicated that he had fired the weapon. Oberlin described his own position in the gang hierarchy at the time as that of an "old-G," or elder. Oberlin explained that his position was above that of "foot soldiers," but below the chief enforcers, the chief and the vice president.

During closing argument, the prosecutor argued that defendant was the "chief enforcer" of the Insane Deuces and killed Marcus Lee because he thought Lee was "a Stone." The jury found defendant guilty of first degree murder. Juror Gomez served as the foreperson of the jury.

At a subsequent hearing, the circuit court denied defendant's posttrial motion and proceeded to sentencing. The State argued that an extended-term sentence was warranted because the murder was committed in a brutal and heinous manner indicative of wanton cruelty (*see* 730 ILCS 5/5-5-3.2(b)(2) (West 1998)) and defendant was a leader in the Insane Deuces street gang and the murder was related to the gang's activities (*see* 730 ILCS 5/5-5-3.2(b)(8) (West 1998)). Defense counsel argued that the murder was not committed in a brutal and heinous manner and, though all the witnesses referred to defendant as the

"chief enforcer" of the gang, "it was not clearly shown that defendant was a leader, motivator or supervisor" of the gang. The circuit court determined that an extended-term sentence was warranted, stating:

> "I further find that [defendant] was indeed a chief enforcer of the Insane Deuces gang, * * * and a weapon was obtained at his direction and a search for rival gang members was then had."

Continuing, the court concluded, "It was a senseless, brutal killing and I feel that under the circumstances this was a gang incident, gang motivated at the direction of this defendant." The circuit court apparently accepted the State's contention—now discredited—that the principles of *Apprendi* do not apply because the sentencing range for first degree murder is "twenty to death by lethal injection." See *People v. Swift,* 202 Ill.2d 378, 392, 269 Ill.Dec. 495, 781 N.E.2d 292 (2002) (sentencing range for first degree murder in Illinois is 20 to 60 years' imprisonment). The circuit court sentenced defendant to an extended-term sentence of 85 years in the Illinois Department of Corrections.

Thereafter, defendant filed a motion to reconsider sentence. At the hearing on that motion, defense counsel argued that *Apprendi* requires *a jury* to find the factors enabling the imposition of an extended-term sentence. Counsel also argued that defendant was not in a leadership position within the gang, as required by the statute, because his place in the gang hierarchy places him below "the chief" and required him to carry out the chief's orders. The circuit court persisted in its prior ruling and denied the motion for reconsideration. Defendant appealed.

A divided appellate panel affirmed the judgment of the circuit court. The court was united in holding

that a "trial court has standing to act on behalf of a juror subject to discriminatory jury selection practices." 348 Ill.App.3d at 176, 284 Ill.Dec. 476, 810 N.E.2d 129. The appellate court cautioned that the trial court has a *right* to raise *Batson* objections *sua sponte,* but it has no corresponding *duty* to do so. 348 Ill.App.3d at 176, 284 Ill.Dec. 476, 810 N.E.2d 129.

Relying upon this court's opinion in *People v. Hudson,* 157 Ill.2d 401, 193 Ill.Dec. 128, 626 N.E.2d 161 (1993), the appellate majority found it unnecessary to "consider whether combined race-gender discrimination can be used to establish a *prima facie* case under *Batson.*" 348 Ill.App.3d at 177, 284 Ill.Dec. 476, 810 N.E.2d 129. The majority cited this court's opinion in *Hudson* for the general proposition that "once the trial court rules on the ultimate question of discrimination the question of whether a *prima facie* case had been established is moot," and thus the majority rejected the dissent's argument that the "matter should be remanded for a hearing on whether a *prima facie* case existed." 348 Ill.App.3d at 177, 284 Ill.Dec. 476, 810 N.E.2d 129. The appellate majority observed, "because the trial court's determination [on the *prima facie* issue] is based on its own observations, the first stage of the *Batson* inquiry will necessarily collapse." 348 Ill.App.3d at 178, 284 Ill.Dec. 476, 810 N.E.2d 129. The majority recognized that "allowing a trial court to *sua sponte* raise a *Batson* issue creates the potential for abuse"; however, the court majority rejected the dissent's call for the trial court to make a record and "articulate the basis for the perceived *Batson* violation" as "a meaningless rhetorical exercise" and "mindless adherence to the three-step analysis of *Batson.*" 348 Ill.App.3d at 178, 284 Ill.Dec. 476, 810 N.E.2d 129. The appellate majority then noted that "great deference" is accorded the trial court's ulti-

mate determination on review (348 Ill.App.3d at 178, 284 Ill.Dec. 476, 810 N.E.2d 129, citing *People v. Harris,* 206 Ill.2d 1, 17, 276 Ill.Dec. 419, 794 N.E.2d 314 (2002)) and concluded that the trial court, "weigh[ing] the credibility of defense counsel's explanation" for defendant's peremptory challenge, "could rationally find a motive to discriminate against African-Americans, women, or both groups simultaneously." 348 Ill.App.3d at 178-79, 284 Ill.Dec. 476, 810 N.E.2d 129.

Justice Gallagher, specially concurring, acknowledged that "it is arguable that the excusal did not constitute a pattern of strikes against African-Americans, since defense counsel also excused a white male and a white female"; however, he believed there was at least "an *inference* of purposeful discrimination." (Emphasis in original.) 348 Ill.App.3d at 182, 284 Ill.Dec. 476, 810 N.E.2d 129 (Gallagher, J., specially concurring). Justice Gallagher stated, "[I]t is inferable that the court believed that a *prima facie* case was established when defense counsel excluded a second African-American." The justice concluded, "Whether one agrees or disagrees is not the point. The point is that step one of the *Batson* process was followed." 348 Ill.App.3d at 182, 284 Ill.Dec. 476, 810 N.E.2d 129 (Gallagher, J., specially concurring).

Presiding Justice O'Mara Frossard, dissenting, disagreed, arguing that the trial court improperly "collapsed what ought to be a three-step procedure into an undifferentiated review of the jury selection process." 348 Ill.App.3d at 183, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting). Presiding Justice O'Mara Frossard noted that the record in this case fails to reflect that the trial court examined relevant factors bearing upon the establishment

of a *prima facie* case of discrimination. 348 Ill.App.3d at 183, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting). Presiding Justice O'Mara Frossard argued that "*Hudson* is not determinative in the factual context of this case, where a trial judge *sua sponte* raised a reverse-*Batson* violation and bypassed any determination of a *prima facie* case by requesting race-neutral explanations from defense counsel for his peremptory challenge." 348 Ill.App.3d at 185, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting). The dissent observed that the "trial judge's failure to make a record of the *prima facie* case regarding this uncommon *sua sponte* reverse-*Batson* challenge makes proper review of the *Batson* ruling impossible." 348 Ill.App.3d at 185, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting).

Presiding Justice O'Mara Frossard also pointed out that the majority failed to address defendant's argument that *Batson* is not applicable to combined race-gender discrimination, suggesting that the majority's resort to our opinion in *Hudson* did not obviate the need to determine whether the trial court ultimately based its rejection of defendant's peremptory challenge on its perception of combined race-gender discrimination. 348 Ill.App.3d at 186, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting). The dissent correctly observes that this court has held the "focus of *Batson* is on the exclusion of members of a single identifiable group, not of different groups considered together" (348 Ill.App.3d at 186, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting), citing *People v. Harris*, 164 Ill.2d 322, 344, 207 Ill.Dec. 400, 647 N.E.2d 893 (1994)), and an appellate panel has actually held that *Batson* does not apply "to alleged combined race-gender dis-

crimination." 348 Ill.App.3d at 186, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting), citing *People v. Washington,* 257 Ill.App.3d 26, 34, 194 Ill.Dec. 854, 628 N.E.2d 351 (1993). We note in passing that this court mentioned the appellate court's disposition in *Washington* in the course of our opinion in *Harris,* citing the appellate court's holding as an analogous proposition lending support to our own decision, "declin[ing] * * * to expand the *Batson* rule to embrace the simultaneous consideration of different racial or ethnic groups." *See Harris,* 164 Ill.2d at 344, 207 Ill.Dec. 400, 647 N.E.2d 893. Presiding Justice O'Mara Frossard concluded:

> "[T]he trial court's failure to articulate the circumstances that demonstrate a *prima facie* case of purposeful discrimination leaves unanswered the question of whether the court's finding a *Batson* violation was based on combined race-gender discrimination. The trial judge, by collapsing the *Batson* stages and failing to make findings of fact to clarify the record regarding the relevant circumstances demonstrating a *prima facie* case of purposeful discrimination, has made proper review of this race-gender issue impossible." 348 Ill.App.3d at 186, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting).

Citing the procedure this court sanctioned in *People v. Garrett,* 139 Ill.2d 189, 194, 151 Ill.Dec. 329, 564 N.E.2d 784 (1990), Presiding Justice O'Mara Frossard would have retained jurisdiction and remanded "for a three-step *Batson* hearing on the present record and any additional record the trial court or parties decide to make." 348 Ill.App.3d at 187, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting). If the circuit court then found a *Batson*

violation, Presiding Justice O'Mara Frossard would have required the circuit court to clarify the nature of the violation, *i.e.,* race, gender, or combined race-gender discrimination. 348 Ill.App.3d at 187, 284 Ill.Dec. 476, 810 N.E.2d 129 (O'Mara Frossard, P.J., dissenting).

Unlike the *Batson* issue, there was no separate opinion written with respect to defendant's *Apprendi* issue. The appellate court held that an *Apprendi* violation had occurred because the judge—rather than the jury—found the facts necessary to extend the sentencing range applicable to defendant. 348 Ill.App.3d at 179-80, 284 Ill.Dec. 476, 810 N.E.2d 129. However, relying upon this court's decisions in *Swift* and *People v. Thurow,* 203 Ill.2d 352, 363, 272 Ill.Dec. 185, 786 N.E.2d 1019 (2003), the appellate court determined that "an *Apprendi* violation may be subject to a plain-error or harmless-error analysis" (348 Ill.App.3d at 180, 284 Ill.Dec. 476, 810 N.E.2d 129) and ultimately concluded, based on the uncontested evidence of defendant's position in the gang hierarchy, that the *Apprendi* violation was harmless error. 348 Ill.App.3d at 181, 284 Ill.Dec. 476, 810 N.E.2d 129. Finally, the court rejected defendant's contention that the Illinois Constitution affords greater protection than its federal counterpart, concluding:

> "[W]e find nothing in defendant's discussion of the history of criminal defendants' right to a jury trial in Illinois that compels us to break lockstep and conclude that the harmless-error analysis of *Thurow* is impermissible under the Illinois Constitution." 348 Ill.App.3d at 181, 284 Ill.Dec. 476, 810 N.E.2d 129.

ANALYSIS

We begin our analysis with a review of the function of peremptory challenges in our judicial system and of relevant principles articulated by the United States Supreme Court in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and other pertinent cases.

In *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court stated that the peremptory challenge is "'one of the most important of the rights secured to the accused'" in our criminal justice system because the challenge eliminates "extremes of partiality on both sides" and assures the parties that the case will be decided on the basis of evidence placed before the jurors. *Swain,* 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d at 772, quoting *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208, 214 (1894). See also *People v. Daniels,* 172 Ill.2d 154, 165, 216 Ill.Dec. 664, 665 N.E.2d 1221 (1996) (relying upon the foregoing proposition).

In *Batson,* the Supreme Court again acknowledged the important role peremptory challenges occupy in our trial procedures and held, as a constitutional matter, that peremptory challenges may not be used to exclude potential jurors based solely on race. *Batson,* 476 U.S. at 98-99, 106 S.Ct. at 1724, 90 L.Ed.2d at 89. The Court, in *Batson,* held that a *prosecutor* cannot utilize peremptory challenges to excuse potential jurors solely on the basis of their race. *Batson,* 476 U.S. at 89, 106 S.Ct. at 1719, 90 L.Ed.2d at 83. In *Batson,* the defendant and the potential juror in question shared the same racial characteristics.

Subsequently, in *Powers v. Ohio,* 499 U.S. 400, 402, 111 S.Ct. 1364, 1366, 113 L.Ed.2d 411, 419 (1991), the Court held that a defendant in a criminal trial has standing to challenge the State's use of peremptory challenges to exclude prospective jurors on account of their race *irrespective of* whether the defendant and the excluded jurors share the same racial characteristics. In so holding, the Court determined that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete injury, that he has a close relation to the third party, and there exists some hindrance to the third party's ability to protect its own interests. *Powers,* 499 U.S. at 410-11, 111 S.Ct. at 1370-71, 113 L.Ed.2d at 425. The Court found that *jurors* have rights under its *Batson* jurisprudence, stating, although "[a]n individual juror does not have a right to sit on any particular petit jury, * * * he or she does possess the right not to be excluded from one on account of race." *Powers,* 499 U.S. at 409, 111 S.Ct. at 1370, 113 L.Ed.2d at 424. Speaking of discriminatory jury-selection practices, the Court stated: "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed *the court* to adhere to the law throughout the trial of the cause." (Emphasis added.) *Powers,* 499 U.S. at 412, 111 S.Ct. at 1371, 113 L.Ed.2d at 426. The Court concluded that the defendant was a proper party to raise a violation of *a juror's* rights under *Batson.*

Two justices of the Court were not of the belief that jurors actually possess rights in the jury-selection process which are independent of the rights of the parties. See *Powers,* 499 U.S. at 417-31, 111 S.Ct. at 1374-82, 113 L.Ed.2d at 429-39 (Scalia, J., dissenting,

joined by Rehnquist, C.J.). In dissent, Justice Scalia wrote:

> "To affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge. * * * Not only is it implausible that such a permanent and universal feature of our jury-trial system is unconstitutional, but it is unlikely that its elimination would be desirable. The peremptory challenge system has endured so long because it has unquestionable advantages. As we described in *Holland,* 493 U.S. at 484 [110 S.Ct. 803], it is a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible. In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of this device should not be minimized." *Powers,* 499 U.S. at 425, 111 S.Ct. at 1378, 113 L.Ed.2d at 434-35 (Scalia, J., dissenting, joined by Rehnquist, C.J.).

Subsequently, the Court again focused on the equal protection rights of excluded jurors in its decision in *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). In *McCollum,* the Court held that the constitution prohibits not only the prosecution, but also a criminal defendant, from engaging in purposeful racial discrimination in the exercise of peremptory challenges. *McCollum,* 505 U.S. at 59, 112 S.Ct. at 2359, 120 L.Ed.2d at 51. In so holding, the Court recognized the *State's* standing to attack the defendant's use of peremptory challenges on racial grounds, observing that, "[a]s the representative of all its citizens, the State is the logical and proper

party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial." *McCollum,* 505 U.S. at 56, 112 S.Ct. at 2357, 120 L.Ed.2d at 49.

In *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Supreme Court again extended the reasoning, prohibitions, and procedures of *Batson,* this time to peremptory strikes based on gender. Reminiscent of the analysis employed in *Powers* and *McCollum,* the Court in *J.E.B.* stated: "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B.,* 511 U.S. at 140, 114 S.Ct. at 1427, 128 L.Ed.2d at 104. The Court pointedly observed that the "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender." *J.E.B.,* 511 U.S. at 140, 114 S.Ct. at 1427, 128 L.Ed.2d at 104.

Five justices wrote or subscribed to separate opinions in *J.E.B.,* either concurring and expressing concerns, or dissenting outright. Justice O'Connor, concurring in the judgment, expressed her concerns over the proliferation of "*Batson* minihearings" in the state and federal trial courts, and over the further erosion of the role of the peremptory challenge, which she acknowledged to be a valuable practice that "helps produce fair and impartial juries." *J.E.B.,* 511 U.S. at 147, 114 S.Ct. at 1431, 128 L.Ed.2d at 108 (O'Connor, J., concurring). Justice Kennedy, who also concurred in the judgment, expressed this perplexing cautionary concern: "We do not prohibit racial and gender bias in jury selection only to encourage it in

jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own." *J.E.B.*, 511 U.S. at 153, 114 S.Ct. at 1434, 128 L.Ed.2d at 112 (Kennedy, J., concurring). Justice Scalia—with whom Chief Justice Rehnquist and Justice Thomas joined in dissent—expressed his view that the *Batson* principle is "theoretically boundless" (*J.E.B.*, 511 U.S. at 161, 114 S.Ct. at 1438, 128 L.Ed.2d at 117 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.)), he reiterated his criticism of the "uniquely expansive third-party standing analysis of *Powers*" (*J.E.B.*, 511 U.S. at 158-59, 114 S.Ct. at 1437, 128 L.Ed.2d at 115-16 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.)), and he offered the following analysis of the equal protection issue:

> "The core of the Court's reasoning is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause. That conclusion can be reached only by focusing unrealistically upon individual exercises of the peremptory challenge, and ignoring the totality of the practice. Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection." *J.E.B.*, 511 U.S. at 159, 114 S.Ct. at 1437, 128 L.Ed.2d at 116 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.).

Suffice it to say that the expansion of the *Batson* principle, and the correlative, creeping circumscription of peremptory challenges, has not proceeded

without misgivings and dissent among the justices of the Supreme Court.

We turn now to the procedure the Court established to effectuate the *Batson* principle. In *Batson,* the Supreme Court established a three-step process for evaluating alleged discrimination in jury selection. The Court held that the party objecting to the exercise of a peremptory challenge is first required to establish a *prima facie* case of purposeful discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." See *Batson,* 476 U.S. at 93-94, 106 S.Ct. at 1721, 90 L.Ed.2d at 85-86. If the objector demonstrates a *prima facie* case, the burden then shifts to the other party to explain his challenge by articulating a nondiscriminatory, "neutral" explanation related to the particular case to be tried. *Batson,* 476 U.S. at 97-98, 106 S.Ct. at 1723-24, 90 L.Ed.2d at 88. Finally, the trial court considers the reasons provided for the peremptory strike. As part of that process, the objector may argue that the reasons given are pretextual. The trial court then makes a final determination as to whether the objector has established purposeful discrimination. *Batson,* 476 U.S. at 98, 106 S.Ct. at 1724, 90 L.Ed.2d at 88-89.

In the course of implementing the principles and procedures of *Batson,* this court has repeatedly cautioned that the first and second steps in the process "should not be collapsed into a single, unitary disposition that dilutes the distinctions between a * * * *prima facie* showing of discrimination and the * * * production of neutral explanations for its peremptory challenges." *People v. Wiley,* 156 Ill.2d 464, 475, 190 Ill.Dec. 736, 622 N.E.2d 766 (1993); see also *People v. Jackson,* 145 Ill.2d 43, 98, 163 Ill.Dec. 859, 582

N.E.2d 125 (1991) (warning trial courts not to omit the first step in the *Batson* analysis altogether), *vacated on other grounds*, 506 U.S. 802, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992); *People v. Garrett,* 139 Ill.2d 189, 201, 151 Ill.Dec. 329, 564 N.E.2d 784 (1990). Accord *Purkett v. Elem,* 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834, 839 (1995).

In *Batson,* the Supreme Court stated that courts should consider "all relevant circumstances" in deciding whether a party has made the requisite showing of a *prima facie* case. *Batson,* 476 U.S. at 96-97, 106 S.Ct. at 1723, 90 L.Ed.2d at 87-88. This court has held, in determining whether the objector has demonstrated purposeful discrimination against African-Americans at the *prima facie* stage, a trial judge should consider, *inter alia,* the following relevant factors:

> "(1) racial identity between the [party exercising the peremptory challenge] and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements [of the challenging party] during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses." *People v. Williams,* 173 Ill.2d 48, 71, 218 Ill.Dec. 916, 670 N.E.2d 638 (1996).

The list of factors would obviously be modified appropriately to address claims of purposeful discrimination directed at other protected groups.

The party attempting to exercise a peremptory challenge is not required to provide race-neutral reasons for the exercise of its peremptory challenge if a *prima facie* case of purposeful racial discrimination has not been demonstrated. See *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. A ruling on the sufficiency of a *prima facie* case of purposeful discrimination is a finding of fact that will not be reversed unless it is against the manifest weight of the evidence. *People v. Coleman,* 155 Ill.2d 507, 514, 187 Ill.Dec. 479, 617 N.E.2d 1200 (1993).

As this court has noted, a trial court's *third stage* finding on the ultimate issue of discrimination rests largely on credibility determinations. *McDonnell v. McPartlin,* 192 Ill.2d 505, 527, 249 Ill.Dec. 636, 736 N.E.2d 1074 (2000). Consequently, the trial court's finding is entitled to "great deference" and will not be set aside unless clearly erroneous. *McDonnell,* 192 Ill.2d at 527, 249 Ill.Dec. 636, 736 N.E.2d 1074; *People v. Munson,* 171 Ill.2d 158, 175, 215 Ill.Dec. 125, 662 N.E.2d 1265 (1996). As the Supreme Court observed in *Hernandez v. New York,* 500 U.S. 352, 365, 111 S.Ct. 1859, 1869, 114 L.Ed.2d 395, 409 (1991), there will seldom be much evidence bearing upon the ultimate question of discrimination and the "best evidence often will be the demeanor of the attorney who exercises the challenge." The evaluation of the attorney's state of mind is most often "based on demeanor and credibility" and thus "lies 'peculiarly within the trial judge's province.'" *Hernandez,* 500 U.S. at 365, 111 S.Ct. at 1869, 114 L.Ed.2d at 409, quoting *Wainwright v. Witt,* 469 U.S. 412, 428, 105

S.Ct. 844, 854, 83 L.Ed.2d 841, 854 (1985). As the Supreme Court acknowledged in *Hernandez,* the credibility of the attorney's explanation "goes to the heart of the equal protection analysis, *and once that has been settled, there seems nothing left to review.*" (Emphasis added.) *Hernandez,* 500 U.S. at 367, 111 S.Ct. at 1870, 114 L.Ed.2d at 410.

With these principles in mind, we turn to the question of the trial court's standing and authority to raise a *Batson* issue *sua sponte.* Applying the Supreme Court's three criteria for standing, and our own state principles, it seems clear to us that trial courts possess such authority.

First, the Supreme Court's pronouncements dictate the conclusion that a trial court suffers an injury as significant as either of the parties when discrimination takes place in jury selection. In *Powers,* the Court explicitly stated that the "overt wrong" of discrimination in jury selection "casts doubt over the obligation of * * * the court to adhere to the law throughout the trial of the cause." *Powers,* 499 U.S. at 412, 111 S.Ct. at 1371, 113 L.Ed.2d at 426. In *J.E.B.,* the Court observed that the "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation" by the aggrieved juror. *J.E.B.,* 511 U.S. at 140, 114 S.Ct. at 1427, 128 L.Ed.2d at 104. In short, perceived discrimination in jury selection reflects negatively on the integrity of the judge who presides over the proceedings.

Second, as the appellate court in this case observed, "the relationship between the trial court and the jury is even closer than the relationship between the parties and the jury." 348 Ill.App.3d at 175, 284 Ill.Dec. 476, 810 N.E.2d 129. As the appellate court

noted: "The trial court and the jury are the only participants in the trial duty bound to act impartially, and the jury relies on the trial court for its instructions * * *." 348 Ill.App.3d at 175, 284 Ill.Dec. 476, 810 N.E.2d 129. Indeed, the jurors look to the trial judge as the overseeing authority and impartial arbiter of the proceedings, and the judge is the only participant in the trial who will supervise and direct their activities while they serve as jurors. As a practical matter, the presiding judge is an authority figure for those who serve as jurors. Thus, we find that the second criterion for standing has been satisfied.

Finally, the Supreme Court has already found that the third criterion—hindrance to the third party's ability to protect its own interests—exists in this context. In *Powers,* the Court concluded: "[T]here exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. [Citations.] The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Powers,* 499 U.S. at 415, 111 S.Ct. at 1373, 113 L.Ed.2d at 428. Thus, Supreme Court precedent supports our conclusion that a trial court has the standing to raise a *Batson* issue *sua sponte.*

Moreover, this court has held that courts possess the inherent power "to enable them to perform their judicial functions with * * * dignity." *People ex rel. Bier v. Scholz,* 77 Ill.2d 12, 19, 31 Ill.Dec. 780, 394 N.E.2d 1157 (1979). Since the "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation" of potential jurors (*J.E.B.,* 511

U.S. at 140, 114 S.Ct. at 1427, 128 L.Ed.2d at 104), it follows that the trial judge should have the means to preserve the dignity of his or her office. Furthermore, this court has held that a trial court has the *right*—though not the *duty*—to remove a juror for cause. See *People v. Metcalfe,* 202 Ill.2d 544, 557, 270 Ill.Dec. 69, 782 N.E.2d 263 (2002). Granting trial courts the authority to raise *Batson* issues *sua sponte* is merely a logical extension of the powers circuit courts already possess. Thus, we conclude that a trial court has the authority to raise a *Batson* issue *sua sponte* in appropriate circumstances.

Our holding in this regard is consistent with the conclusion reached by courts of other jurisdictions. See *Hitchman v. Nagy,* 382 N.J.Super. 433, 889 A.2d 1066 (2006); *People v. Bell,* 473 Mich. 275, 702 N.W.2d 128 (2005); *State v. Evans,* 100 Wash.App. 757, 998 P.2d 373 (2000); *Commonwealth v. Carson,* 559 Pa. 460, 741 A.2d 686 (1999); *Williams v. State,* 669 N.E.2d 1372 (Ind.1996); *Brogden v. State,* 102 Md.App. 423, 649 A.2d 1196 (1994); *Lemley v. State,* 599 So.2d 64 (Ala.Crim.App.1992). However, as the court observed in *Hitchman,* courts so holding have generally been careful to insist upon a clear indication of a *prima facie* case of purposeful discrimination *before* trial courts are authorized to act. *Hitchman,* 382 N.J.Super. at 444-47, 889 A.2d at 1072-74. We agree that a *prima facie* case of discrimination must be abundantly clear before a trial court acts *sua sponte.* Moreover, when a trial court chooses to act *sua sponte,* it must make an adequate record, consisting of all relevant facts, factual findings, and articulated legal bases for both its finding of a *prima facie* case and for its ultimate determination at the third stage of the *Batson* procedure.

In this regard, we reject the appellate majority's reliance upon a general statement from this court's opinion in *People v. Hudson,* 157 Ill.2d 401, 427-28, 193 Ill.Dec. 128, 626 N.E.2d 161 (1993), as a means to avoid consideration of "whether combined race-gender discrimination can be used to establish a *prima facie* case under *Batson.*" 348 Ill.App.3d at 176-77, 284 Ill.Dec. 476, 810 N.E.2d 129. The appellate majority concluded that "once the trial court rules on the ultimate question of discrimination, the question of whether a *prima facie* case had been established is moot." 348 Ill.App.3d at 177, 284 Ill.Dec. 476, 810 N.E.2d 129, citing *Hudson,* 157 Ill.2d at 427, 193 Ill.Dec. 128, 626 N.E.2d 161. Such a statement does indeed appear in *Hudson,* on more than one occasion; however, the statement has been taken out of its original context, and it does not comport with the procedural requirements we hereby adopt when a trial court acts *sua sponte* to raise a *Batson* issue.

In *Hudson,* this court quoted from the Supreme Court's opinion in *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991): "'Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot.'" *Hudson,* 157 Ill.2d at 427, 193 Ill.Dec. 128, 626 N.E.2d 161, quoting *Hernandez,* 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 405. We later observed: "[T]his court has recently held that once the trial court rules on the ultimate question of discrimination, the question of whether the defendant established a *prima facie* case became moot. *People v. Mitchell* (1992), 152 Ill.2d 274, 289-90 [178 Ill.Dec. 354, 604 N.E.2d 877]." *Hudson,* 157 Ill.2d at 427-28,

193 Ill.Dec. 128, 626 N.E.2d 161. This court then concluded its discussion of the issue, stating, "Pursuant to *Hernandez,* the question of whether defendant in the instant case established a *prima facie* case of discrimination became moot *when the trial court found the State's explanations were valid.*" (Emphasis added.) *Hudson,* 157 Ill.2d at 428, 193 Ill.Dec. 128, 626 N.E.2d 161. Similarly, in *Mitchell,* this court cited *Hernandez* in support of its conclusion that "the question of whether defendant established a *prima facie* case of racial discrimination became moot *when the trial court found that the prosecutor's explanations for the challenges were valid and neutral.*" (Emphasis added.) *Mitchell,* 152 Ill.2d at 289, 178 Ill.Dec. 354, 604 N.E.2d 877. Indeed, in *Hernandez,* the reasons given by the prosecutor were also deemed valid and neutral. *Hernandez,* 500 U.S. at 372, 111 S.Ct. at 1873, 114 L.Ed.2d at 414.

Clearly, whether a *prima facie* case of discrimination exists at the outset becomes a moot point after the trial court finds valid and race-neutral reasons supporting the peremptory challenge and a court of review ultimately affirms that ruling. The party exercising a peremptory challenge suffers no prejudice in that instance because the juror in question is excused pursuant to that party's original challenge. The converse, however, is not true. Where a *prima facie* case does *not* exist, a party whose challenge is ultimately denied *is* prejudiced, because the matter should not have been advanced to the second step of the *Batson* process, and he should never have been compelled by the trial court to offer justification for his challenge in the first place. By definition, a "*prima facie* case" entails "[t]he establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the

fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1228 (8th ed.2004). In every procedural context wherein a *prima facie* case is required, the party with the burden of establishing a *prima facie* case must first meet its burden in order to advance the litigation to subsequent stages and, ultimately, to be entitled to relief. See generally *People v. Orth,* 124 Ill.2d 326, 338, 125 Ill.Dec. 182, 530 N.E.2d 210 (1988) ("Since the [initial] burden was upon the [suspended] motorist [to present a *prima facie* case for rescission], the circuit court erred: first, by requiring the State to go forward with evidence justifying the suspension, and, second, by rescinding the suspension even though the motorist had not presented any evidence for rescission"). The burden of establishing a *prima facie* case of purposeful discrimination in jury selection is on the party making the *Batson* claim. *McDonnell v. McPartlin,* 192 Ill.2d 505, 526, 249 Ill.Dec. 636, 736 N.E.2d 1074 (2000). It defies procedural logic that proof of a *prima facie* case could be insufficient to advance the *Batson* process to the second and third steps; yet, the party attempting to exercise its challenge could ultimately lose when the matter is erroneously advanced to the subsequent stages. Therefore, when a party is ultimately *denied* its right to exercise a peremptory challenge, we hold that matters bearing upon the first stage of the *Batson* process are properly within the scope of appellate review and not moot.

Comprehensive appellate review of *Batson* proceedings, and adequate records and findings enabling such a review, are critical when a trial court decides to raise a *Batson* claim *sua sponte.* There are at least three reasons why this is so. First, a litigant objecting to an opposing party's peremptory challenge, as the party making the *Batson* claim, would normally have

the burden of establishing a *prima facie* case of discrimination, and the *ultimate* burden of establishing purposeful discrimination. See *McDonnell,* 192 Ill.2d at 526, 249 Ill.Dec. 636, 736 N.E.2d 1074. When the trial court acts *sua sponte,* it relieves a litigant of those burdens. Second, when a trial court acts *sua sponte,* it necessarily means that the opposing party—in this case the State—has failed to act. The evidentiary implications associated with that inaction are not conclusive, but they are nonetheless cause for concern. Inaction may suggest that the opposing party did not perceive circumstances indicating purposeful discrimination, which in some instances may indicate that no such circumstances exist. In that situation, articulation of the bases for the trial court's finding is essential, because the normal adversarial process will not provide the requisite bases and record. Finally, without an adequate record, consisting of all relevant facts, factual findings, and articulated legal bases for both the trial court's finding of a *prima facie* case and its ultimate determination at the third stage of the *Batson* procedure, the trial court's rulings may be virtually immune from appellate review. If, for example, we were to hold—as the appellate court did—that the existence of a *prima facie* case is a moot point, we would not be able to review the circuit court ruling that required defense counsel to justify his peremptory challenge of Gomez. Once that procedural frontier is crossed, the outcome of the *Batson* inquiry then hinges upon whatever facts the trial court has deigned to provide for us and, more importantly, whether the trial court finds counsel's explanation for the peremptory challenge credible and benign. As the Supreme Court noted in *Hernandez,* evaluation of the attorney's state of mind is most often "based on demeanor and credibility" and

thus "lies 'peculiarly within the trial judge's province'" (*Hernandez,* 500 U.S. at 365, 111 S.Ct. at 1869, 114 L.Ed.2d at 409, quoting *Wainwright v. Witt,* 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841, 854 (1985)), "*and once that has been settled, there seems nothing left to review.*" (Emphasis added.) *Hernandez,* 500 U.S. at 367, 111 S.Ct. at 1870, 114 L.Ed.2d at 410. Thus, the inability to review the propriety of a trial court's first-stage *Batson* ruling, combined with the problems associated with *sua sponte* action and a deficient record on appeal, might well result in a decision that is for all intents and purposes unreviewable, giving trial courts *carte blanche* to apply—or misuse—the principles of *Batson* in any way they wish. That specter is the impetus for the procedural requirements we adopt today. Indeed, strict adherence to the three-step procedure specified by the Supreme Court would seem to be the surest way to guarantee compliance with *Batson* principles.

We now examine the pertinent portions of the record in this case. During defense counsel's brief preliminary questioning of juror Gomez, counsel inquired about Gomez's employment with an outpatient clinic of Cook County Hospital. Gomez acknowledged that Cook County Hospital is known for the treatment of gunshot victims and, as a part of her employment at the clinic, she has contact with patients, "checking them in." When defense counsel sought to excuse Gomez, the trial judge raised the *Batson* issue, and compelled defense counsel to "articulate a basis" for the peremptory challenge, without any mention of a *prima facie* case of discrimination or of any facts bearing upon that issue. It was only *after* defense counsel had begun to state the nondiscriminatory basis for his challenge—Gomez's connection to the clinic and victims of violent crime—

that the court interrupted, noting that "Mrs. Deloris Gomez appears to be an African American." When counsel observed that he had previously accepted an African-American woman to sit on the jury, the court quickly pointed out that Gomez was the second African-American woman that the defense had sought to exclude. The court also stated it was counsel's articulated reason for the peremptory challenge that was of particular concern. Obviously, the articulated reason for a challenge is a matter of "concern" only *after* a *prima facie* case has been established. The existence of a *prima facie* case is a prerequisite for the court to demand an explanation. In any event, the court then stated for the record, "If the State in fact had done this, I certainly would have found they would have established a *prima facie* case by the very reason—what I'm going to do is allow Ms. Gomez—allow her to be seated, not excuse her on the basis of your peremptory." It is telling that the trial court never explained "the very reason" it believed a *prima facie* case of discrimination existed. The court simply stated, "I feel under these circumstances the reasons given by you, Mr. Decker, do not satisfy this Court. As far as I'm concerned, it's more than a *prima facie* case of discrimination against Mrs. Gomez. I'm not going to allow her to be excused."

Defense counsel then asked for, and was granted, leave to conduct further questioning of Gomez. In the course of that questioning, Gomez conceded that some of the patients she interacts with are "victims of gun violence"; however, she maintained that fact would not affect her ability to be fair. After questioning Gomez, defense counsel explained that he was "not trying to excuse a juror because of her race." Counsel then stated that one consideration was his attempt to "get some impact from * * * men in the

case" as the jury panel was then composed of "predominantly women." Counsel further informed the court that he was familiar with the clinic where Gomez worked and it was "wall to wall victims and patients." Counsel described it as "a disturbing place." The court responded: "I've had the opportunity to question Deloris Gomez[,] who I find is a very intelligent lady. I considered her statements very carefully, her testimony very carefully, and I again feel that she shall sit as a juror." In view of the court's ruling, defense counsel then chose to exercise his fourth peremptory challenge against Kurich. With respect to *that* peremptory challenge, the judge responded, "With reluctance, I will allow it."

Because the trial court did not state the basis for its finding of *prima facie* discrimination, we do not know whether the trial court believed the peremptory challenge defendant sought to exercise against Gomez represented an instance of racial discrimination, or gender discrimination, or combined race-gender discrimination. We do know that defendant had exercised a peremptory challenge against an African-American woman previously, and had accepted another African-American woman for service on the jury. Moreover, the record indicates that defense counsel had previously exercised peremptory challenges against Rosalee Huizenga and Thomas Hickey, whose racial characteristics are not specified in the record. In his opening brief, defendant states that Huizenga "was not a black woman and Thomas Hickey [was] a white male." The State, in its own statement of facts, merely names Huizenga and Hickey as persons who were excused by the defense. The State does not dispute defendant's representation regarding their racial characteristics. In fact, in arguing that the trial court did *not* act on the basis of

perceived race-gender discrimination, the State asserts that "the trial court's remarks make it clear that the court's *sua sponte* reverse-*Batson* challenge was grounded solely on the race of Ms. Gomez." The State's argument in that respect necessarily admits that Hickey was white, because, if he was not, the trial court surely would have commented on the use of a peremptory to excuse him, and it did not. Given the statements of the parties and the court on the record, it is reasonable to assume, at least, that Huizenga was not an African-American woman, and Hickey was a white male.

Normally, the party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party. *People v. Evans,* 186 Ill.2d 83, 92, 237 Ill.Dec. 118, 708 N.E.2d 1158 (1999); see also *People v. Furdge,* 332 Ill.App.3d 1019, 1031, 266 Ill.Dec. 309, 774 N.E.2d 415 (2002). Given the requirements we impose today, when a trial court acts *sua sponte,* the *trial court* must see to it that adequate facts are preserved in the record to support its ruling, and the trial court in this instance has not done so.

This court has held that the mere number of African-American venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination. *People v. Heard,* 187 Ill.2d 36, 56, 240 Ill.Dec. 577, 718 N.E.2d 58 (1999); *Garrett,* 139 Ill.2d at 203, 151 Ill.Dec. 329, 564 N.E.2d 784. Where a party claiming a *Batson* violation has not provided any other information to support his claim of discriminatory jury selection, he has failed to establish a *prima facie* case. *Heard,* 187 Ill.2d at 56, 240 Ill.Dec. 577, 718 N.E.2d 58. The number of per-

sons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the *voir dire* answers of those who were struck compared to the answers of those who were not struck. *United States v. Ochoa-Vasquez,* 428 F.3d 1015, 1044 (11th Cir.2005). As previously noted, in determining whether the objector has demonstrated purposeful discrimination against African-Americans at the *prima facie* stage, a trial judge should consider the following relevant factors:

> "(1) racial identity between the [party exercising the peremptory challenge] and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements [of the challenging party] during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses." *People v. Williams,* 173 Ill.2d 48, 71, 218 Ill.Dec. 916, 670 N.E.2d 638 (1996).

We also note, when a *Batson* claim is made regarding discrimination against a particular race, the unchallenged presence of jurors of that race on the seated jury is a factor properly considered (*People v. Brown,* 172 Ill.2d 1, 35, 216 Ill.Dec. 733, 665 N.E.2d 1290 (1996); see *People v. Martinez,* 335 Ill.App.3d 844, 854, 269 Ill.Dec. 791, 781 N.E.2d 588 (2002)) and

tends to weaken the basis for a *prima facie* case of discrimination (*Ochoa-Vasquez*, 428 F.3d at 1044-45).

Examining the facts that *are* included in this record, in the framework of the foregoing factors, we see no clear indication of a *prima facie* case of racial discrimination. The only factor that appears to weigh in favor of finding a *prima facie* case is the fact that defendant is Hispanic and both the victim and Gomez were African-American. Given the current state of the record, we find that none of the other considerations supports the trial court's apparent belief that a *prima facie* case existed. First, we do not find an impermissible pattern of strikes against African-Americans or a disproportionate use of peremptory challenges against African-American venirepersons. We know only that, prior to the attempt to strike Gomez, defense counsel used peremptory challenges to strike one African-American woman, but he also accepted one African-American woman for service on the jury. Counsel also struck one woman who was not African-American and a white male. It seems to us that for this court to say that a pattern developed when defendant attempted to strike a second African-American woman, we would have to find that a pattern would have developed if defendant had moved to strike a second woman who was not of African-American heritage or a second white male. We do not believe that inference is warranted or wise as it would result in precedent that a pattern develops anytime a party strikes more than one juror of any race or gender. Second, we are unable to compare the level of African-American representation in the venire with that of defendant's jury—as Illinois courts have done so effectively in prior cases (see *People v. Edwards*, 301 Ill.App.3d 966, 973-74, 235 Ill.Dec. 409, 704 N.E.2d 982 (1998))—because the requisite

information has not been made a part of the record on appeal. Other than the African-American woman accepted by defendant, we do not know the race of any other members of the jury that convicted defendant. Third, we do not find the questions or statements of defense counsel particularly troubling prior to the time that the trial court advanced the matter to the second stage of the *Batson* procedure and demanded an explanation from counsel. The questions asked by counsel pertained to Gomez's employment at a clinic and her contact with the victims of violent crime. Defendant was on trial for a crime of violence. We note in this regard that the Seventh Circuit Court of Appeals has held that "a challenge based on a juror's social or medical work is race-neutral and understandable" in the context of a criminal case. See *United States v. Griffin,* 194 F.3d 808, 826 (7th Cir.1999), citing *Coulter v. Gilmore,* 155 F.3d 912, 919-20 (7th Cir.1998). While defense counsel did, eventually, make comments suggesting an impermissible gender-based motive for removing *Gomez* from jury service, that remark was made *after* the court had already denied the peremptory challenge, and it is unclear whether the factor had a bearing on the court's ruling as the basis for the court's ruling itself is uncertain. Finally, from this record, we are unable to say that the African-Americans defendant sought to exclude were a heterogeneous group sharing race as their only common characteristic. In short, the record in its current state does not reveal a *prima facie* case of racial discrimination, if indeed that—as opposed to race-gender discrimination—was the basis for the trial court's *sua sponte* action.

In sum, we hold that a trial court may raise a *Batson* issue *sua sponte,* but it may do so only when a

prima facie case of discrimination is abundantly clear. Moreover, the trial court must make an adequate record consisting of all relevant facts, factual findings, and articulated bases for both its finding of a *prima facie* case and for its ultimate determination at the third stage of the *Batson* procedure. The record in this case is insufficient to demonstrate either a *prima facie* case of racial discrimination or the bases for the trial court's rulings.

Although we have previously warned circuit courts against collapsing the *Batson* procedure, it was, perhaps, not clear until today that the existence of a *prima facie* case of discrimination would continue to be a relevant issue for purposes of appeal where, as here, the circuit court ruled upon the ultimate issue of discrimination, and decided that issue adversely to the party attempting to exercise a peremptory challenge. In this case, there may be evidence that was not made a part of the record because the trial court believed that the preliminary matter of a *prima facie* case would become moot after it ruled on the third-stage issue.

In light of that possibility, we believe it is appropriate to remand this cause to the circuit court for a limited hearing to allow the trial judge an opportunity to articulate the bases for his *Batson* rulings. We are particularly interested in findings of fact and conclusions of law with respect to the threshold question of a *prima facie* case of discrimination, and clarification as to the *kind* of discrimination the trial judge believed to be in evidence when the defense sought to excuse juror Gomez, *i.e.*, race, gender, or combined race-gender. We take judicial notice of the fact that the original trial judge, Judge Fiala, has now retired from the bench. Given the unusual procedural cir-

cumstances of this case, he may provide this information via affidavit if he so desires, pointing to pertinent information already in the record, and identifying any physical evidence not currently of record (such as juror questionnaires or profiles) that the court and the parties utilized in the jury-selection process. We also offer Judge Fiala an opportunity to explain his "reluctance" to allow a subsequent peremptory challenge against juror Kurich. In that respect, we note that a defendant is entitled to an "impartial judge," meaning one who is not predisposed to rule in a given manner. See *People v. Williams,* 124 Ill.2d 300, 308, 124 Ill.Dec. 577, 529 N.E.2d 558 (1988). Following the reception of this evidence, the circuit court shall file any supplemental record in this matter with the clerk of this court within 60 days of the issuance of the mandate in this matter, accompanied by a record of the proceedings on remand, and any request by the parties to submit additional briefs or further argue issues pertaining to the threshold question of a *prima facie* case of discrimination. After proceedings on remand have been completed, and any supplemental arguments have been considered, this court will announce its judgment on any and all pending issues requiring resolution at that time. See *Garrett,* 139 Ill.2d at 195, 151 Ill.Dec. 329, 564 N.E.2d 784.

Cause remanded with directions.

Chief Justice THOMAS and Justices FREEMAN, McMORROW, FITZGERALD, KILBRIDE, and GARMAN concurred in the judgment and opinion.

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

No. 98 C 3865

THE PEOPLE OF THE STATE OF ILLINOIS

v.

MICHAEL RIVERA

REPORT OF PROCEEDINGS of the hearing before the Honorable MARJORIE LAWS, on the 15th day of November, 2006.

* * * *

[2] THE COURT: Record should reflect that all parties are present in the case of People of the State of Illinois versus Michael Rivera. This matter is here on mandate from the Supreme Court before the Honorable Fiala who is is now retired to make certain additional findings. Judge Fiala is present here. The Defendant Mr. Rivera is present with his attorney.

Would you state your name?

MS. HODEL: Assistant Public Defender Jennifer Hodel, H-o-d-e-l, on behalf of Michael Rivera who is present here in I.D.O.C. custody.

THE COURT: All right. And representing the State are the Assistant State's Attorneys.

MR. McKAY: James McKay, Assistant State's Attorney.

MR. MURRAY: Bernie Murray.

MR. BYRNE: And Jim Byrne.

THE COURT: Judge Fiala is here in court and is available and is ready to make further findings concerning—pursuant to the mandate from the Illinois Supreme Court.

JUDGE FIALA: Thank you. I wish to thank the Court for giving me the opportunity to explain the basis of my rulings in the instant case. The scenario [3] presented to me during voir dire was as follows:

The Defendant was charged with the offense of murder. The deceased was an African American male. His mother was also an African American. The Defendant is Hispanic. The jury was composed of a majority of women; I believe after review of the transcripts, nine women and three men. One African American female was accepted as a juror. Another whose race was in fact unknown was excused as well. Couldn't tell by her name what race she belonged to. No one had any personal recollection. One female was excused. She had been African American as well. Defendant sought to excuse another female African American, a Mrs. Gomez, peremptorily. She was the third female juror challenged by the Defendant. Mr. Decker examined Mrs. Gomez in open court as I did during voir dire. His voir dire examination of Mrs. Gomez essentially went to the nature of her employment and the exposure she may have had to pictures of victims of violence.

She testified that she could be fair and impartial and in fact did not work in the hospital in question namely the Cook County Hospital, but was employed as a supervisor in a separate building and she worked in the business office. She said that she could

[4] be fair and impartial and would follow the instructions on the law by this court.

Mr. Decker asked this court for additional voir dire while we were in chambers. I should indicate at that point Mr. Decker desired to peremptorily excuse Mrs. Gomez. I asked the parties to join me in chambers and all parties, the Defendant, counsel for the Defendant, the State's Attorney, the court reporter, this Court all were in chambers. At that point I asked Mr. Decker to demonstrate a neutral basis why Mrs. Gomez should be withdrawn. He asked leave for additional voir dire as I said before and that was in fact granted. He did not establish any neutral basis as to why she should be withdrawn.

I indicated I was raising a Batson issue because Mrs. Gomez was in fact the second woman peremptorily challenged by the Defendant. A majority of the jury consisted of women. And I felt that under these circumstances the Defendant was seeking to excuse Mrs. Gomez because she in fact was a woman. That he wanted input he said for the record for male jurors. The women comprised a majority of the jury selected and that he attempted to "balance" the jury by trying to get more men on the jury. Those remarks are of record [5] and also incorporated in the Appellate Court's opinion.

I further found that because of his remarks and considering the nature of his questions that counsel in purposely engaged in a discrimination against Mrs. Gomez. I felt that Step 1 of the three step Batson analysis was met and not collapsed under the circumstances.

In as much as I made that particular ruling, we immediately proceeded to consideration in Steps 2

and 3. There was no reason to have any delay. I had found that in as much as there had been a purposeful discrimination against Mrs. Gomez because of her gender, and I resolved the ultimate issue accordingly, I had the opportunity to consider relevant circumstances, and I also observed the Defendant and the parties in making that analysis. And I then felt that the second and third steps of the three step analysis had in fact been met, and neither of those steps in fact were collapsed.

Batson requires that all relevant circumstances raise an inference of purposeful discrimination. By defense counsel's admission that he was seeking to exclude Mrs. Gomez was readily established. And under totality I found that there was [6] no basis to exclude her. That in fact she had in fact been discriminated against because of her gender. That I found this case not to be one of race gender but of in fact gender.

Under these particular circumstances where it appeared very obviously to this court by observing counsel and considering his admission as to why he wants to excuse women as jurors, I felt that her 14th Amendment right to be a juror would in fact be violated if she was so excused. And she was otherwise qualified; as she in fact was.

And in summary again I find that there was no neutral reason to excuse Mrs. Gomez. And that three women in fact were excused. Two; one as to gender– Strike that. Both as to gender. I felt further that prima facie case in fact had been established. Namely, there had been a gender prejudice or bias. I have nothing further with respect to that.

There is another issue this court had to consider. And that was a remark that was attributed to this court. And this is response to the remark, "with reluctance I will allow it."

When in chambers with Mrs. Gomez this Court sua sponde ruled that it would not remove Mrs. Gomez. [7] Counsel for the Defendant objected. He asked for an additional examination of her, and I allowed his request. At the conclusion of his examination I found that he did not demonstrate any neutral basis to exclude her as a juror, and she was directed to be seated in the jury box.

While still in chambers Mrs. Gomez, the Court, counsel, had an off the record discussion. Mrs. Gomez was present I should say for that discussion, her off the record conversation. While still in chambers without Mrs. Gomez the Court, counsel had an off the record conversation.

When we resumed our hearing, Mr. Decker asked this Court to exclude Mr. Kurich, K-u-r-i-c-h, at page A, 219 of the record. He at [sic] heretofore been accepted as a juor. We were in the selection of the last panel. It was my policy not to allow backstriking as counsel sought to do in this particular case. Under the circumstances, however, because my ruling relative to counsel's handling of this particular case, I felt it was–I would allow backstriking and Mr. Kurich was accordingly removed. It was at that point I said, "with reluctance I will allow it." This is a term I use when circumstances warrant it. This was out of the [8] presence of the jury and Mrs. Gomez. There was no prejudice to the Defendant. Counsel said nothing of the remark and nothing of the said remark was reflected in any motion, trial, or appeal that I am aware of.

In this very case before this Court I consider similar statements made in two instances with respect to juror Ernest Webb, W-e-b-b- at A, 193. Mr. Webb was excused by agreement of both counsel. It was obviously that he did not wish to be a, juror. My experience told me that if he were excused the next perspective jurors wishing to avoid jury duty would repeat Mr. Webb's reluctance to sit as a juror and the basis for that reluctance. And this may even cause given the late hour this was heard a run by others who wished to avoid jury duty as well. I wanted to demonstrate, however, that this Court felt very strongly about those who wished to avoid jury duty. I said in this case, "Mr. Webb, it is with a tremendous amount of reluctance. You are excused. If I had my brothers and if I had them I would get a bus to send all of you who do not wish to sit in this courtroom to the Daley Center. I would have no hesitation—in other words I would do this without a moment's hesitation. You're excused. Join the officer."

[9] I pursued a similar tactic with respect to one Doherty, D-o-h-e-r-t-y, at A, 185. He had been stricken also by agreement of counsel as not being responsive to the Court to questions propounded by then. I said similar to the case in question the following: "Mr. Doherty with great reluctance I assure you, you are going to be excused. Join the officer."

As I stated before, I was reluctant to allow backstriking without a showing of plausible reason. Under the circumstances because of my rulings of Mrs. Gomez as I said before, I allowed it. Remark in this case was made only to counsel, not to the parties in question as in the case of Mr. Webb and Mr. Doherty.

It has always been my duty to grant all of those, and I consider it a duty to grant all of those who ap-

pear before me a fair and impartial treatment. I never have knowingly been unfair in my treatment of all parties who appear before me. I've had the privilege to sit for 26 years, 9 months, and tried approximately 200 juries. I was and I am proud of my record and my service to this judiciary. I would not jeopardize Defendant's right to an impartial trial nor impede my record in any way at all. With that that concludes my comments. Thank you.

[10] THE COURT: Thank you, Judge Fiala. I will ask the court reporter to prepare a daily copy of that transcript for tomorrow. I will supplement the Court file with the transcript, order it to the Clerk of the Circuit Court for him to send to the Supreme Court instanter. That concludes this hearing.

(The above-entitled cause was recalled.)

THE CLERK: Michael Rivera.

MS. HODEL: Jennifer Hodel on behalf of Michael Rivera who is present in I.D.O.C. custody.

MR. McKAY: James McKay, Bernie Murray, and James Byrne Assistant State's Attorneys on behalf of the People.

MS. HODEL: Judge, we did have proceedings back in the jury room with Judge Fiala as to what the Supreme Court had requested pursuant to their mandate. At this juncture though I wanted to renew my request that had made on the last court date specifically that I'd be allowed the opportunity to call, if you will, rebuttal evidence; specifically, Steve Decker who is Mr. Decker's trial attorney. He specifically had withdrawn in the anticipation of there being a conflict of interest based on the fact that he anticipated being a potential witness, given the issues the Su-

preme Court [11] was wanting some more information as to I had requested that I be allowed the opportunity to call Mr. Decker potentially for rebuttal purposes as to what if any information Judge Fiala would be submitting to the Court; whether it was via live testimony or via an affidavit.

On the last court date your Honor denied my request to do so. I am once again renewing that request for the sole purpose that I do believe that this would be the opportunity for us to supplement the record with any events, in you will, from the defense perspective, addressing the issues that the Supreme Court was wanting answered.

THE COURT: All right. I attempted to follow the orders of the Supreme Court. And the mandate from the Supreme Court asks for an affidavit or a limited hearing for Judge Fiala's explanations as to his rulings during the trial of Mr. Rivera. Those issues—I think I pointed it to you before—if the appellate attorneys wanted to go back to the Supreme Court and ask for that, I would have conducted that today. The case still may come back if that issue was raised at that point and time. But today I attempted to follow the four corners of the order by the mandate sent back [12] by the Supreme Court. And again it only requested a hearing or explanation or statement from Judge Fiala. And that was done in the jury room with all parties present and Mr. Rivera. All right.

At this point and time I am going to remand the case back to the Supreme Court for further proceedings, and I am removing the case from my call.

MS. HODEL: Judge, if I may just again for purposes of the record in the alternative then, assuming the denial of my request to call any rebuttal evidence,

I would also be making a request to submit an offer of proof, if you will, as to what, if any, evidence I would be wanting to supplement the record with had I been allowed to call Mr. Decker as a witness. Obviously Mr. Decker is not available today. He is currently in federal court. And at this juncture I am not aware as to what if any offer of prove I would be in a position to make because I haven't been able to speak with Mr. Decker, given what just transpired this morning. Again I think it's unclear given the languages of the opinion as to at what level this would take place. Whether it would be at the trial court level or the Appellate Court level. But I am making a request here at the trial court level that we be given [13] the opportunity to at least make an offer of proof as to what our rebuttal evidence would be had we been allowed to do so.

THE COURT: All right. You can go ahead.

MS. HODEL: Again, Judge, I can make—not make such an offer of proof at this time given Mr. Decker's unavailability and my inability to speak with him given this morning's proceedings.

THE COURT: But it would appear to me that that offer of proof can still be made when the case goes back to the Supreme Court. If the appellate attorney wants to make that offer of proof at that point and time, he can do that also.

MS. HODEL: That may or may not be the case. I just summarily at this stage am making that request. If that is in fact the nature of the course, we will see if we can go about doing so at the Appellate Court level. And I have been in contact with the appellate attorney, Mr. James Levin, and will continue to be in contact with him after today's proceedings.

THE COURT: All right. I thought you were going to be able to make it today. Other than that I am going to take the case off my call today.

(End of proceedings.)

SUPREME COURT OF ILLINOIS

No. 98609

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

MICHAEL RIVERA,
Appellant.

Nov. 29, 2007

OPINION

Justice KARMEIER delivered the judgment of the court, with opinion:

Defendant, Michael Rivera, was charged in the circuit court of Cook County with two counts of first degree murder. Following a jury trial, defendant was found guilty and was subsequently sentenced to 85 years' incarceration in the Illinois Department of Corrections. Defendant appealed, arguing, that (1) the trial court erred when it *sua sponte* raised a reverse-*Batson* (see *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)) challenge to his use of a peremptory challenge during jury selection; (2) the procedure resulting in the imposition of his extended-term sentence violated the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and (3) the procedure resulting in the imposition of his extended-term sentence violated his right to a jury trial as guaranteed by the Illinois constitution. A divided appellate panel

rejected those contentions and affirmed defendant's conviction and sentence. 348 Ill.App.3d 168, 284 Ill.Dec. 476, 810 N.E.2d 129. We granted the plaintiff's petition for leave to appeal. 210 Ill.2d R. 315.

When the matter was initially before this court, defendant advanced multiple arguments, all of which were merely facets of the same *Batson* and *Apprendi* arguments defendant raised below. Specifically, defendant submitted that (1) trial judges do not have third-party standing to raise *Batson* challenges *sua sponte;* (2) the trial court's *sua sponte Batson* challenge to defense counsel's peremptory strike of juror Deloris Gomez was incompatible with the three-step *Batson* process; (3) the trial court erred in proceeding to the second step of the *Batson* process where no inference of a *prima facie* case of discrimination had been established; (4) the trial judge erred in his ultimate determination that defense counsel discriminated against juror Gomez; (5) the trial court's improper denial of defense counsel's peremptory strike of juror Gomez was reversible error; (6) the trial court's "violation of state statutory and constitutional guarantees to jury trial" are not amenable to harmless-error review; (7) *Apprendi* violations are not subject to harmless-error review; and (8) *Apprendi* violations in this case are not harmless beyond a reasonable doubt.

Upon our initial consideration of this matter, we held that a trial court has the authority to raise a *Batson* issue *sua sponte,* but "it may do so only when a *prima facie* case of discrimination is abundantly clear." *People v. Rivera,* 221 Ill.2d 481, 515, 304 Ill.Dec. 315, 852 N.E.2d 771 (2006). We stated, when a court acts *sua sponte,* "the trial court must make an adequate record consisting of all relevant facts, fac-

tual findings, and articulated bases" for its finding of a *prima facie* case. *Rivera*, 221 Ill.2d at 515, 304 Ill.Dec. 315, 852 N.E.2d 771. We concluded that the record before us did not reveal a *prima facie* case of racial discrimination, "if indeed that * * * was the basis for the trial court's *sua sponte* action" (*Rivera*, 221 Ill.2d at 515, 304 Ill.Dec. 315, 852 N.E.2d 771), as the State then argued (see *Rivera*, 221 Ill.2d at 511, 304 Ill.Dec. 315, 852 N.E.2d 771 ("the State asserts that 'the trial court's remarks make it clear that the court's *sua sponte* reverse-*Batson* challenge was grounded solely on * * * race'")). We remanded this cause to the circuit court for a hearing on the matter of the existence of a *prima facie* case of discrimination, urging the trial judge to include in the record any omitted evidence pertinent to that question and to articulate proper findings of fact and conclusions of law with respect to the threshold question of a *prima facie* case of discrimination, specifying, in particular, what *kind* of discrimination the judge believed was at issue, *i.e.*, race, gender, or combined race-gender. Because of our interim disposition, we did not address defendant's other issues.

The hearing in question has since been conducted, the trial judge having stated on the record that he believed a *prima facie* case of *gender* discrimination was evident when defense counsel sought to excuse juror Deloris Gomez by peremptory challenge. The matter now returns to this court for further consideration.

Pertinent facts prior to remand were fully set forth in our previous opinion. We reiterate facts as necessary to provide a framework for our disposition, beginning with the issue that resulted in remand.

During jury selection, defense counsel questioned juror Deloris Gomez, a business office supervisor at Cook County Hospital's outpatient orthopedic clinic. In the course of that questioning, Gomez acknowledged that Cook County Hospital is known for the treatment of gunshot victims and, as a part of her employment at the clinic, she has contact with patients, "checking them in." Gomez said her interaction with the victims of violent crime would not affect her ability to serve as a juror in the case. Following *voir dire,* and apparently in the presence of Gomez and other prospective jurors, defense counsel announced his intention to use his fourth peremptory challenge against Gomez, as the following excerpt from the transcript indicates:

> "MR. DECKER [defense attorney]: Your Honor, with thanks, we would ask to excuse Mrs. Gomez.
>
> THE COURT: I'm going to ask you to remain, Mrs. Gomez. I'm going to ask counsel to join me, if the court reporter will join me, and the defendant will join me in chambers. Excuse me, ladies and gentlemen."

In chambers, the court directed defense counsel to "kindly articulate a basis of why you are excusing Ms. Gomez." Defense counsel protested, "The court has done it on its own motion *sua sponte.*" The trial court responded: "I will do it. It is the citizen's right to sit as a juror, and I will implicate myself *sua sponte* if I feel somebody's rights are being impinged upon * * *." Defense counsel then complied with the court's directive, responding:

> "Mrs. Gomez has a connection to a hospital that on a daily basis probably sees more gunshot vic-

> tims than any other hospital in the world * * *. Given that fact that she's in the orthopedic section, I think on a daily basis even though she's a supervisor, even though she's not a rehabilitative nurse, she on a daily basis sees those victims who are victims of violent crime. For those reasons it constrains me. I know she has some kind of Hispanic connection given her name. I'm pulled in two different ways. For those reasons I asked that the–."

At that point in defense counsel's explanation, the trial court interrupted counsel, noting that "Mrs. Deloris Gomez appears to be an African-American." The court then asked to "hear from" the State on the issue, the prosecutor having been totally silent and uninvolved to that juncture. After some initial observations regarding the theory of the case and the issue for the jury's consideration, the prosecutor, apparently sensing the court's sentiment, stated that the offered reason for excusing Gomez was insufficient. Defense counsel then noted that he had previously accepted an African-American woman to sit on the jury, and the court quickly pointed out that Gomez was the second "African-American female" that the defense had sought to exclude. The court stated it was the articulated reason given for the peremptory challenge of Gomez that was of particular concern. The court concluded:

> "I've heard her answers to the questions. I've looked at her jury information form, and I'm quite frankly very much concerned, Counsel, as to why Mrs. Deloris is being excused–Mrs. Deloris Gomez is being excused. She works in a clinical division of this hospital. It may have a reputation of having many emergency cases, I

> presume, involving gunshot cases, but again she works in a business office, the very first line identifying her job.
>
> * * *
>
> I did this *sua sponte* because I was concerned about the right of Mrs. Gomez to be a juror and participate. If the State in fact had done this, I certainly would have found they would have established a *prima facie* case by the very reason—what I'm going to do is allow Ms. Gomez—allow her to be seated, not excuse her on the basis of your peremptory.
>
> I feel under these circumstances the reasons given by you, Mr. Decker, do not satisfy this Court. As far as I'm concerned, it's more than a *prima facie* case of discrimination against Mrs. Gomez. I'm not going to allow her to be excused. She will be seated as a juror over objection."

Defense counsel then asked for, and was granted, leave to conduct further questioning of Gomez, and noted defendant's objection of record. After completing that questioning, counsel reiterated his previous bases for excusing Gomez. In apparent response to *his* perception of the court's concerns, counsel stated he was "not trying to excuse a juror because of her race." He then noted that the jury was comprised predominantly of women, and he offered that he was "trying to get some impact from * * * men in the case." The circuit judge responded that he would "override" counsel's peremptory challenge and would seat Gomez as a juror as there was no basis for excusing her for cause.

Pursuant to our remand, a hearing was held on November 15, 2006. At that hearing, the trial judge,

who had since retired, addressed the bases for his *Batson* rulings.

Whether intentionally or unintentionally, the judge's opening remarks make clear that he found race a significant factor in explaining his actions. He commenced with the observation that the murder victim "was an African-American male" and his mother "was also African-American." The judge pointed out: "The Defendant is Hispanic." The judge then proceeded to comment on the gender of jurors, but still noted racial characteristics:

> "The jury was composed of a majority of women; I believe after a review of the transcripts, nine women and three men. One African-American female was accepted as a juror. Another whose race was in fact unknown was excused as well. Couldn't tell by her name what race she belonged to. No one had any personal recollection. One female was excused. She had been African-American as well. Defendant sought to excuse another female African-American, a Mrs. Gomez, peremptorily. She was the third female juror challenged by the Defendant."

The judge noted that defense counsel's *voir dire* examination of Gomez "essentially went to the nature of her employment and the exposure she may have had to pictures of victims of violence." When counsel indicated he wanted to exercise a peremptory challenge against Gomez, the judge asked the parties to join him in chambers, where, according to the judge's assertions in the November 2006 hearing, he indicated he was "raising a *Batson* issue because Mrs. Gomez was in fact the second [*sic*] woman peremptorily challenged by the Defendant." We feel compelled to note, in passing, our foregoing, comprehensive

recitation of events at the original trial, and our previous finding, which necessitated remand in the first place: "Because the trial court did *not* state the basis for its finding of *prima facie* discrimination, we do not know whether the trial court believed the peremptory challenge defendant sought to exercise against Gomez represented an instance of racial discrimination, or gender discrimination, or combined race-gender discrimination." (Emphasis added.) *Rivera,* 221 Ill.2d at 511, 304 Ill.Dec. 315, 852 N.E.2d 771. Contrary to the judge's assertions otherwise, he never stated a basis for his finding. Moreover, to further clarify, we note, though the judge mentioned, in his remarks at the November 2006 hearing, defense counsel's *subsequent* comments as a basis for finding a *prima facie* case of discrimination, those comments were made *in response to* the court's direction to "kindly articulate a basis of why you are excusing Ms. Gomez." Again, as we pointed out in our prior disposition, under these circumstances, "[t]he existence of a *prima facie* case is a prerequisite for the court to demand an explanation." *Rivera,* 221 Ill.2d at 510, 304 Ill.Dec. 315, 852 N.E.2d 771. "[T]he articulated reason for a challenge is a matter of 'concern' only *after* a *prima facie* case has been established." (Emphasis in original.) *Rivera,* 221 Ill.2d at 510, 304 Ill.Dec. 315, 852 N.E.2d 771. Thus, where as here, the trial judge required defense counsel to explain the basis for exercising his peremptory challenge, the judge cannot use counsel's response to his command as a basis for finding a *prima facie* case in the first instance; yet that is what the judge appeared to do at the November 2006 hearing.

Thus, excluding remarks counsel made in response to, or as a result of, the judge's demand for a neutral explanation for the challenge, the bases articulated

by the judge for finding a *prima facie* case of gender discrimination against Gomez consist of the number of challenges exercised against women, and the "nature of the questions" counsel initially asked Gomez during *voir dire*. Although the judge subsequently mentioned that his observation of the parties played a part in the second and third steps of his *Batson* analysis, he made no such comment with respect to his initial finding of a *prima facie* case. He did not mention demeanor as a factor in that regard; nor did he specify what aspect of defense counsel's questioning troubled him.

At the outset of our analysis on this issue, we note the parties now argue that differing standards of review apply to the question of whether a *prima facie* case of discrimination was in evidence when the trial judge acted *sua sponte*. As defendant acknowledges, in our prior opinion, we stated that a manifest weight standard applied, relying upon *People v. Coleman*, 155 Ill.2d 507, 514, 187 Ill.Dec. 479, 617 N.E.2d 1200 (1993). See *Rivera*, 221 Ill.2d at 502, 304 Ill.Dec. 315, 852 N.E.2d 771. However, defendant urges us to adopt a *de novo* standard with respect to questions of law inherent in the resolution of this issue. The State contends that manifest weight *is* the correct standard, quoting from this court's opinion in *People v. Mitchell*, 152 Ill.2d 274, 288, 178 Ill.Dec. 354, 604 N.E.2d 877 (1992) ("[t]he trial court's [*Batson*] determination is a matter of fact, involving an evaluation of credibility"). We observe that the quote from *Mitchell* appears to apply to the *ultimate Batson* determination, rather than the *prima facie* determination specifically. That, however, is not the case with our prior reliance upon *Coleman*.

In any event, we reexamine this question in light of our prior disposition in this matter. When this case was previously before us, we remanded this cause to allow the trial judge an opportunity to "articulate proper findings of fact and conclusions of law with respect to the threshold question of a *prima facie* case of discrimination." *Rivera,* 221 Ill.2d at 515-16, 304 Ill.Dec. 315, 852 N.E.2d 771. Such findings and conclusions are now essential prerequisites to proper review of *sua sponte* action on the part of the trial court, and a court that acts without making an appropriate record does so at its own peril. Given those requirements, we believe the appropriate standard of review should comport with that structure.

We generally apply a bifurcated standard of review in situations where a ruling presents a mixed question of law and fact. A trial court's ruling on a motion to suppress is a case in point. A trial court's findings of fact are not disturbed unless they are against the manifest weight of the evidence, but the ultimate legal determination as to whether a motion to suppress should have been granted, based on those findings, is a question of law to be reviewed *de novo.* See *People v. Pitman,* 211 Ill.2d 502, 512, 286 Ill.Dec. 36, 813 N.E.2d 93 (2004). Similarly, in administrative review, an agency's findings of fact are not reversed unless they are against the manifest weight of the evidence, and questions of law are reviewed *de novo. Girot v. Keith,* 212 Ill.2d 372, 379, 289 Ill.Dec. 29, 818 N.E.2d 1232 (2004). In light of the requirements we have imposed upon trial courts acting *sua sponte* in this context, we believe the bifurcated standard of review is appropriately applied here as well. Thus, when a trial court raises a *Batson* issue *sua sponte,* the court's findings of fact, including any specific observations of record bearing upon demeanor or

credibility, will be accorded the deference the manifest weight standard provides; however, the ultimate legal determination based upon those findings is a legal determination we will make *de novo.*

We turn to the facts and conclusions presented by the original record, and the supplemental record compiled on remand, as they bear upon the existence or nonexistence of a *prima facie* case of *gender* discrimination, which is what the trial judge now claims prompted his action. In that regard, we see only two factors cited by the judge in support of his ruling. On remand, the judge stated he believed a *prima facie* case of gender discrimination was indicated because of the number of women peremptorily challenged by defendant (three) and the "nature of the questions" counsel initially asked Gomez during *voir dire.* Although the judge also referred to counsel's conduct and statements *after* the court demanded an explanation of counsel, as we have held, under the circumstances of this case, comments or conduct thereafter cannot serve as justification for the court's intervention in the first instance. See *Rivera,* 221 Ill.2d at 510, 514, 304 Ill.Dec. 315, 852 N.E.2d 771.

Taking the relevant factors for evaluating a *prima facie* case of alleged *racial* discrimination (*People v. Williams,* 173 Ill.2d 48, 71, 218 Ill.Dec. 916, 670 N.E.2d 638 (1996)), and modifying accordingly for alleged *gender* discrimination (see *Rivera,* 221 Ill.2d at 501, 304 Ill.Dec. 315, 852 N.E.2d 771), we consider the following as pertinent in this context:

> (1) gender identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against female venirepersons; (3) a disproportionate use of peremptory challenges against female venireper-

> sons; (4) the level of female representation in the venire as compared to the jury; (5) the questions and statements of the challenging party during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded female venirepersons were a heterogeneous group sharing gender as their only common characteristic; and (7) the gender of the defendant, victim and witnesses. See *Rivera,* 221 Ill.2d at 501, 304 Ill.Dec. 315, 852 N.E.2d 771.

On remand, the trial judge stated that he believed a *prima facie* case of gender discrimination was indicated because of the number of women peremptorily challenged by defendant (three) and the "nature of the questions" counsel initially asked Gomez during *voir dire.* The judge's assertions seem to implicate factors two through six set forth above. Therefore, we will focus on facts bearing upon those factors in our analysis.

The record in this case indicates that 7 men and 14 women were examined for jury service prior to consideration of juror Gomez. Out of that group, five men and four women were excused for cause. Defendant used peremptory challenges to excuse one man and two women. The State exercised a peremptory challenge against one woman. Of the initial group of 21 venirepersons, one male was accepted for jury service, and seven women were selected by the parties. As the trial judge emphatically noted, the challenge defendant exercised against juror Gomez was the second challenge against an *African-American* female, and the third against a female generally. Counsel had previously objected, unsuccessfully, to the excusal of an Hispanic female for cause.

As we indicated in our prior opinion, the mere number of persons in a protected class who are peremptorily challenged, without more, will not establish a *prima facie* case of discrimination. *Rivera,* 221 Ill.2d at 512, 304 Ill.Dec. 315, 852 N.E.2d 771, citing *People v. Heard,* 187 Ill.2d 36, 56, 240 Ill.Dec. 577, 718 N.E.2d 58 (1999). The number of persons struck takes on meaning only when coupled with other information, such as the characteristics of the venire overall, the characteristics of others struck, and the answers of those who were not struck. *Rivera,* 221 Ill.2d at 512, 304 Ill.Dec. 315, 852 N.E.2d 771, citing *United States v. Ochoa-Vasquez,* 428 F.3d 1015, 1044 (11th Cir.2005). The unchallenged presence of jurors from the protected class on the seated jury is a factor properly considered (*Rivera,* 221 Ill.2d at 513, 304 Ill.Dec. 315, 852 N.E.2d 771, citing *People v. Brown,* 172 Ill.2d 1, 35, 216 Ill.Dec. 733, 665 N.E.2d 1290 (1996)) and tends to weaken the basis for a *prima facie* case of discrimination (*Rivera,* 221 Ill.2d at 513, 304 Ill.Dec. 315, 852 N.E.2d 771, citing *Ochoa-Vasquez,* 428 F.3d at 1044-45). The party asserting a *Batson* claim has the burden of establishing a *prima facie* case and preserving the record. *Rivera,* 221 Ill.2d at 512, 304 Ill.Dec. 315, 852 N.E.2d 771. As we held in our prior opinion, that burden falls upon a trial court when it acts *sua sponte. Rivera,* 221 Ill.2d at 512, 304 Ill.Dec. 315, 852 N.E.2d 771.

The record in this case simply does not support the action taken by the trial court. Since women outnumbered men on the venire two to one, it would not be unusual, from a statistical standpoint, that defendant had used peremptory challenges against two women and one man prior to consideration of juror Gomez. Moreover, although defendant did not question Rosalee Huizenga—the second woman

challenged—he *did* question Elizabeth Alexander—the first woman challenged—and he might well have decided to excuse her because her cousin was a police officer and she was about to get a degree in criminal justice. As far as juror Gomez is concerned, the fact that she had frequent contact with gunshot victims seems to us a valid reason why defense counsel might want to excuse her, and defense counsel's questioning reveals nothing of a discriminatory nature. If the trial judge saw something in counsel's demeanor or actions that led him to believe otherwise, he has not seen fit to make those observations a part of the record. The judge's reference to the "nature of the questions" counsel asked suggests that it was the *content* of the questions that concerned him. However, the questions asked of Gomez are a matter of record, and we see nothing in that questioning which would support a *prima facie* case of gender discrimination—or, for that matter, a case of *racial* discrimination.

The trial judge's statements during jury selection, frankly, suggested that he believed defense counsel was engaged in either racial discrimination or combined race-gender discrimination. Otherwise, why would the judge repeatedly emphasize that Gomez was *African-American?* If gender were the only consideration, there would be no reason to mention the juror's race. It simply is not relevant. It is interesting to note that the judge *still* felt obliged to mention the race of the parties and persons in the venire on remand, when he was making a record to support a case for *gender* discrimination.

In any event, we find that the record fails to support a *prima facie* case of discrimination *of any kind.* Consequently, the defendant was improperly

denied a peremptory challenge. The question, then, is whether reversal is required.

The parties cite legions of cases from other jurisdictions in support of their respective positions, the State arguing that the denial of the peremptory challenge is subject to harmless-error analysis, and the defendant arguing automatic reversal. We believe this issue can be resolved on the basis of precedents from this court and the United States Supreme Court, and our analysis will proceed accordingly.

As we noted in our prior opinion in this matter, the peremptory challenge has been described by the United States Supreme Court as ""one of the most important of the rights secured to the accused"" insofar as it eliminates "'extremes of partiality on both sides.'" *Rivera,* 221 Ill.2d at 496, 304 Ill.Dec. 315, 852 N.E.2d 771, quoting *Swain v. Alabama,* 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759, 772 (1965), quoting *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208, 214 (1894). In Justice Scalia's majority opinion in *Holland v. Illinois,* 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990), he discussed the "venerable" history of the peremptory challenge, stating:

> "[T]hat device occupies 'an important position in our trial procedures,' *Batson,* 476 U.S., at 98 [106 S.Ct. 1712], and has indeed been considered 'a necessary part of trial by jury,' *Swain v. Alabama,* 380 U.S., at 219 [85 S.Ct. 824]. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' *ibid.,* thereby 'assuring the selection of a qualified *and unbiased jury,*' *Batson, supra,* at 91 [106 S.Ct.

1712] (emphasis added)." *Holland,* 493 U.S. at 484, 110 S.Ct. at 809, 107 L.Ed.2d at 918-19.

In his dissent in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), Justice Scalia described the peremptory challenge as "a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible." *Powers,* 499 U.S. at 425, 111 S.Ct. at 1378, 113 L.Ed.2d at 434-35 (Scalia, J., dissenting, joined by Rehnquist, C.J.). In its 1965 decision in *Swain,* the Supreme Court stated, in *dictum,* that the denial or impairment of the right to a peremptory challenge is "reversible error without a showing of prejudice." *Swain,* 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d at 772.

Although various members of the Supreme Court continue to acknowledge the importance of peremptory challenges, after *Batson,* the status of the peremptory challenge underwent a gradual, but marked change, culminating in the Court's decision in *United States v. Martinez-Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), and it is now clear that the Supreme Court no longer considers peremptory challenges indispensable to a fair trial or their erroneous denial a matter necessarily requiring reversal.

We note, initially, that the passage from *Batson,* which Justice Scalia quoted in part in *Holland,* actually states that peremptory challenges are "*one* means of assuring the selection of a qualified and unbiased jury." (Emphasis added.) *Batson,* 476 U.S. at 91, 106 S.Ct. at 1720, 90 L.Ed.2d at 84. The qualification "one" suggests that the Court does not consider peremptory challenges the *only* means of as-

suring the selection of an impartial tribunal, nor, perhaps, a *necessary* means. The *Batson* Court reiterated that "the Constitution does not confer a right to peremptory challenges." *Batson,* 476 U.S. at 91, 106 S.Ct. at 1720, 90 L.Ed.2d at 84. In fact, the Court has long recognized that there is nothing in the Constitution of the United States which requires the granting of peremptory challenges in criminal cases. *Stilson v. United States,* 250 U.S. 583, 586, 40 S.Ct. 28, 30, 63 L.Ed. 1154, 1156 (1919).

In 2000, the Supreme Court rendered its decision in *United States v. Martinez-Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), the case that appears to have signaled the end of *Swain's* automatic-reversal rule. In *Martinez-Salazar,* the Court first differentiated between the right to an impartial jury and the right to exercise peremptory challenges:

> "[W]e have long recognized * * * that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension." *Martinez-Salazar,* 528 U.S. at 311, 120 S.Ct. at 779, 145 L.Ed.2d at 800.

Noting its previous holding in *Ross v. Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), a case in which a defendant was forced to exercise a peremptory challenge to cure a trial court's error in denying a challenge for cause, the Court stated, "without more, 'the loss of a peremptory challenge [does not] constitute[ ] a violation of the constitutional right to an impartial jury.'" *Martinez-Salazar,* 528 U.S. at 313, 120 S.Ct. at 780, 145 L.Ed.2d at 801, quoting *Ross,* 487 U.S. at 88, 108 S.Ct. at 2278, 101 L.Ed.2d at 90. In *Martinez-Salazar,* the Court went

on to hold, specifically, that a defendant's exercise of peremptory challenges is *not* denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause. *Martinez-Salazar,* 528 U.S. at 317, 120 S.Ct. at 782, 145 L.Ed.2d at 804. However, the most significant part of the Supreme Court's opinion for present purposes is set forth in a footnote. As the briefs in this case indicate, that footnote has caused courts across the country to reexamine the automatic-reversal rule of *Swain.* That footnote states as follows:

> "Relying on language in *Swain v. Alabama,* 380 U.S. 202 [85 S.Ct. 824, 13 L.Ed.2d 759] (1965), as did the Court of Appeals in the decision below, Martinez-Salazar urges the Court to adopt a remedy of automatic reversal whenever a defendant's right to a certain number of peremptory challenges is substantially impaired. Brief for Respondent 29 (a "'denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice'") (quoting *Swain,* 380 U.S., at 219 [85 S.Ct. 824].) Because we find no impairment, we do not decide in this case what the appropriate remedy for a substantial impairment would be. We note, however, that the oft-quoted language in *Swain* was not only unnecessary to the decision in that case—because *Swain* did not address any claim that a defendant had been denied a peremptory challenge—but was founded on a series of our early cases decided long before the adoption of harmless-error review." *Martinez-Salazar,* 528 U.S. at 317 n. 4, 120 S.Ct. at 782 n. 4, 145 L.Ed.2d at 804 n. 4.

Thus, in *Martinez-Salazar,* the Court clearly took issue with *Swain's* suggestion that the erroneous denial or impairment of the right to exercise a peremptory challenge requires automatic reversal, characterizing that assertion as *dictum,* and signaling that legal proposition is no longer good law in the age of "harmless-error review."

We observe that the footnote purports to address only "a remedy of automatic reversal whenever * * * *a certain number* of peremptory challenges is substantially impaired." (Emphasis added.) *Martinez-Salazar,* 528 U.S. at 317 n. 4, 120 S.Ct. at 782 n. 4, 145 L.Ed.2d at 804 n. 4. Obviously, in our situation, the question at hand concerns the appropriate remedy when a defendant seeks to exercise a peremptory challenge against a *specific* juror, and the challenge is disallowed. However, the distinction appears to be one without a difference insofar as the "oft-quoted language in *Swain,*" to which the Court referred, broadly encompasses any "'"denial or impairment of the right [to exercise peremptory challenges]."'" *Martinez-Salazar,* 528 U.S. at 317 n. 4, 120 S.Ct. at 782 n. 4, 145 L.Ed.2d at 804 n. 4, quoting *Swain,* 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d at 772. Moreover, the denial of "a certain number" of peremptory challenges is not significantly different from the denial of a peremptory challenge against a *specific* juror. In the former instance, a party is denied the opportunity to excuse a juror whom he suspects harbors some bias, though he cannot prove it; the same is true in the latter instance. Thus, we believe the observation in the footnote applies to the circumstances presently before this court.

Defendant argues that we should not find that the *Martinez-Salazar* footnote "impliedly overruled the

automatic reversal rule." We see nothing "implied" in the language the Supreme Court employed. The Court undermined the validity of *Swain's* automatic-reversal rule on two fronts: it was *dictum* and the rule was espoused before the advent of harmless-error review. We believe the meaning of the *Martinez-Salazar* footnote is explicit.

Of course, harmless-error review would not apply to an error considered "structural" in nature. However, the error in question would not seem to qualify as a "structural error." While the Supreme Court has recognized a number of "structural errors" requiring automatic reversal (see *Washington v. Recuenco,* 548 U.S. 212, — n. 2, 126 S.Ct. 2546, 2551 n. 2, 165 L.Ed.2d 466, 474 n. 2 (2006)), including trial before a biased trial judge (*Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)), the erroneous denial of a peremptory challenge has not been included in that list. In *Recuenco,* the Court noted: "Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Recuenco,* 548 U.S. at —, 126 S.Ct. at 2551, 165 L.Ed.2d at 474. As the Court stated in *Recuenco:* "'"[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."'" *Recuenco,* 548 U.S. at —, 126 S.Ct. at 2551, 165 L.Ed.2d at 474, quoting *Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35, 46 (1999), quoting *Rose v. Clark,* 478 U.S. 570, 579, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460, 471 (1986). While trial before a biased tribunal *would* deprive a defendant of a substantial right and consti-

tute structural error (see *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)), there is no evidence that defendant was tried before a biased jury, or even *one* biased juror. He does not suggest that Gomez was subject to excusal for cause. Thus, we do not see the error as one fitting within the Supreme Court's framework of "structural errors." Nor can a "substantial right" be implicated, as the Supreme Court considers harmless-error review applicable.

Defendant argues that harmless-error analysis cannot apply here because "Gomez's presence on the jury cannot be qualitatively assessed for harm." We disagree. The Supreme Court's decision in *Neder,* and our recent decisions in *People v. Thurow,* 203 Ill.2d 352, 272 Ill.Dec. 185, 786 N.E.2d 1019 (2003), and *People v. Nitz,* 219 Ill.2d 400, 302 Ill.Dec. 418, 848 N.E.2d 982 (2006), illustrate the error in defendant's position.

In *Neder,* the Supreme Court held the omission of an element of the charged offense from a jury instruction falls into the category of errors amenable to harmless-error review. The Court observed:

> "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (Emphasis in original.) *Neder,* 527 U.S. at 9, 119 S.Ct. at 1833, 144 L.Ed.2d at 47.

The Court went on to enunciate the test for determining whether a constitutional error is harmless: "Is it clear beyond a reasonable doubt that a rational

jury would have found the defendant guilty absent the error?" *Neder,* 527 U.S. at 18, 119 S.Ct. at 1838, 144 L.Ed.2d at 53.

In *People v. Thurow,* 203 Ill.2d 352, 272 Ill.Dec. 185, 786 N.E.2d 1019 (2003), relying upon the Supreme Court's opinion in *Neder,* this court held that *Apprendi* violations are subject to harmless-error analysis. In *Thurow,* as in *Nitz,* a *judge* found an element necessary for sentence enhancement when a *jury* should have been charged with that determination. In *Thurow,* this court found the *Apprendi* violation harmless, stating:

> "Given the evidence in support of this element, it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found defendant guilty of involuntary manslaughter against a household member. We therefore conclude that the failure to instruct the jury as to this element was harmless error." *Thurow,* 203 Ill.2d at 369, 272 Ill.Dec. 185, 786 N.E.2d 1019.

In *Nitz,* we were called upon to address the appellate court's deviant application of harmless-error analysis to an *Apprendi* violation. We noted:

> "In applying that analysis * * * the appellate court determined that it should not use an objective standard when determining whether a jury would have found defendant's crime to be brutal and heinous. 353 Ill.App.3d at 1002 [289 Ill.Dec. 760, 820 N.E.2d 536]. Rather, it concluded that defendant 'was constitutionally entitled to have each element of his guilt decided beyond a reasonable doubt by a *jury of his choosing.*' (Emphasis in original.) 353 Ill.App.3d at 1003 [289 Ill.Dec. 760, 820 N.E.2d 536]. Thus, the appel-

> late court considered 'what Nitz's jury, not some hypothetical jury, would have decided had it been allowed to decide.' 353 Ill.App.3d at 1003 [289 Ill.Dec. 760, 820 N.E.2d 536]." *Nitz,* 219 Ill.2d at 407-08, 302 Ill.Dec. 418, 848 N.E.2d 982.

We rejected the appellate court's subjective jury analysis, stating, "*Thurow* establishes that an appellate court reviewing an *Apprendi* error must examine the evidence and determine what a rational jury would have found. * * * [T]he appellate court in this case erred when it failed to examine the evidence presented at trial and instead attempted to divine the thoughts of the 12 jurors who heard that evidence." *Nitz,* 219 Ill.2d at 413-14, 302 Ill.Dec. 418, 848 N.E.2d 982.

Contrary to defendant's argument otherwise, it may in fact be possible to qualitatively assess for harm Gomez's presence on the jury, by applying the rational juror standard to the evidence adduced against defendant. If the evidence is so overwhelming that no rational jury—or juror—would have acquitted defendant of the offense, then Gomez's presence on the jury cannot be said to have prejudiced him. Thus, we consider the evidence adduced in this case.

The State presented evidence that defendant shot and killed 16-year-old Marcus Lee, erroneously believing that Lee was a member of a rival gang. At trial, the State called Susan Shelton, Miguel Rodriguez, and Charles Oberlin to testify regarding the events of January 10, 1998, the night of the murder. All three witnesses were former members of defendant's gang, the Insane Deuces.

Susan Shelton testified that she was with the defendant on the night of the murder. That evening,

Shelton attended a party where defendant and several other members of the Insane Deuces were also in attendance. At some point in the evening, defendant, Shelton, Carlos Sanchez (also a gang member), and three others left the party in Sanchez's van, with Sanchez driving. While they were driving around defendant saw two persons walking down the street. Defendant identified those individuals as members of a rival gang. Defendant directed Sanchez to stop the van. Defendant then produced a gun and exited the van, but returned a few seconds later, instructing Sanchez to chase the two persons they had just seen. Shelton testified that they never saw those two individuals again that night, but defendant later noticed another individual on the street, and announced, "There go [*sic*] that pussy ass Stone from earlier." Shelton knew that the Insane Deuces and the Stones were rival gangs.

Defendant pointed his gun at Sanchez and ordered him to "stop the fucking van." When the van stopped, defendant exited the van, still holding the gun. Two other occupants followed. Defendant ran around the side of the van, and out of Shelton's sight. Shelton then heard gunshots. Defendant and the others returned to the van, with defendant still holding the gun. The two other individuals with defendant were yelling gang slogans until defendant told them to "shut the fuck up," advising them that he still had "one bullet left." Defendant was the only person Shelton saw armed with a weapon that evening. After the shooting, defendant continued to direct the van's movements. At one point, defendant ordered Sanchez to stop in an alley. Defendant unloaded the gun and handed the shell casings to Shelton. Defendant got out of the van with the gun and later returned without it. Shelton gave the shell casings to

Sanchez, and he apparently disposed of them. Sanchez then took defendant and three other individuals back to the party. Shelton testified that she believed defendant to be the "chief enforcer" of the Insane Deuces, a gang position below the chief, or "jefe," and above the foot soldiers.

Miguel Rodriguez testified that he was a member of the Insane Deuces on January 9, 1998, and several members of the gang—including defendant—were at his home that evening. Between 8:30 and 9 p.m. that night, the group was notified that there were some "Stones" in a park near Rodriguez's home. The group, including defendant and a person named "Nelson," went to the park, where they saw some individuals playing basketball. Defendant began to "throw" gang signs, indicating his allegiance to the gang. When those playing basketball did not respond, the group returned to Rodriguez's home.

Back at Rodriguez's home, defendant referred to the individuals in the park as "pussies" because they were afraid to fight. Later that night, Rodriguez observed defendant in possession of two chrome revolvers. Thereafter, defendant began asking other gang members if they wanted to go with him to the projects. Defendant and other members of the gang left Rodriguez's home between 12:30 and 1 a.m. When Rodriguez next saw defendant it was approximately 3 a.m. At that time, defendant announced to Rodriguez that he was a "Stone killer," and he indicated he had shot someone that evening. Rodriguez identified Nelson as a "chief" of the gang, and defendant as the "chief enforcer." He explained that the role of the chief enforcer was to enforce the chief's decisions.

Charles Oberlin testified that he was a member of the Insane Deuces in January of 1998, and he knew

defendant as the "chief enforcer" of that gang. Around 3 or 4 a.m. on January 10, 1998, Oberlin saw defendant in possession of a chrome gun, and defendant indicated that he had fired the weapon. Oberlin described his own position in the gang hierarchy at the time as that of an "old-G," or elder. Oberlin explained that his position was above that of "foot soldiers," but below the chief enforcers, the chief and the vice president.

After the State rested, defendant proceeded by stipulation. It was stipulated that on January 15, 1998, Oberlin had testified before the grand jury that the last time he saw defendant with a gun was at a laundromat on Belmont on January 8, 1998. Further, it was stipulated that Rodriguez had testified before the grand jury that he did not see an individual named Masina give defendant the handguns, but only saw defendant with the handguns. Further, it was stipulated that Rodriguez gave grand jury testimony indicating that when defendant was explaining how he shot the victim, defendant stated that the victim grabbed his chest, screamed, fell, and never got back up. Finally, it was stipulated that Susan Shelton had testified before the grand jury on January 12, 1998. Shelton testified that, when she was in the van on the evening in question, she heard a gunshot and she then put her head down and closed her eyes, whereafter she heard four more gunshots.

The defense rested without presenting any witnesses.

During closing argument, the prosecutor argued, *inter alia*, that defendant was the "chief enforcer" of the Insane Deuces and killed Marcus Lee because he thought Lee was "a Stone." The jury, comprised of 11

unobjectionable jurors and Gomez, found defendant guilty of first degree murder on this evidence.

At a subsequent hearing, the circuit court denied defendant's posttrial motion and proceeded to sentencing. The State argued that an extended-term sentence was warranted because the murder was committed in a brutal and heinous manner indicative of wanton cruelty (see 730 ILCS 5/5-5-3.2(b)(2) (West 1998)) and because defendant was a leader in the Insane Deuces street gang and the murder was related to the gang's activities (see 730 ILCS 5/5-5-3.2(b)(8) (West 1998)). Defense counsel argued that the murder was not committed in a brutal and heinous manner and, though all the witnesses referred to defendant as the "chief enforcer" of the gang, "it was not clearly shown that defendant was a leader, motivator or supervisor" of the gang. The circuit court determined that an extended-term sentence was warranted, stating:

> "I further find that [defendant] was indeed a chief enforcer of the Insane Deuces gang, * * * and a weapon was obtained at his direction and a search for rival gang members was then had."

Continuing, the court concluded, "It was a senseless, brutal killing and I feel that under the circumstances this was a gang incident, gang motivated at the direction of this defendant." The circuit court apparently accepted the State's contention—now discredited—that the principles of *Apprendi* do not apply because the sentencing range for first degree murder is "twenty to death by lethal injection." See *People v. Swift*, 202 Ill.2d 378, 392, 269 Ill.Dec. 495, 781 N.E.2d 292 (2002) (sentencing range for first degree murder in Illinois is 20 to 60 years' imprisonment). The circuit court sentenced defendant

to an extended-term sentence of 85 years in the Illinois Department of Corrections.

Thereafter, defendant filed a motion to reconsider sentence. At the hearing on that motion, defense counsel argued that *Apprendi* requires *a jury* to find the factors enabling the imposition of an extended-term sentence. Counsel also argued that defendant was not in a leadership position within the gang, as required by the statute, because his place in the gang hierarchy places him below "the chief" and required him to carry out the chief's orders. The circuit court persisted in its prior ruling and denied the motion for reconsideration.

We believe any rational trier of fact would have found defendant guilty of murder on the evidence adduced at trial. Any inconsistencies in the witnesses' grand jury testimony were insignificant when compared to their compelling trial testimony consistently implicating defendant as the perpetrator of the murder. The evidence of defendant's guilt is overwhelming, and the error in denying defendant's peremptory challenge is thus harmless beyond a reasonable doubt. Since that is the case, we need not decide whether the erroneous denial of a peremptory challenge is an error of constitutional dimension in these circumstances.

Further, applying the analyses of *Neder, Nitz* and *Thurow* to defendant's *Apprendi* issue, we find the *Apprendi* violation harmless beyond a reasonable doubt. Section 5-5-3.2(b)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(8) (West 1998)) authorized an extended-term sentence:

> "When a defendant is convicted of a felony other than conspiracy and the court finds that

> the felony was committed under an agreement with 2 or more other persons to commit that offense and the defendant, with respect to the other individuals, occupied a position of organizer, supervisor, financier, or any other position of management or leadership, and the court further finds that the felony committed was related to or in furtherance of the criminal activities of an organized gang or was motivated by the defendant's leadership in an organized gang[.]" 730 ILCS 5/5-5-3.2(b)(8) (West 1998).

Clearly, this murder was gang related and involved the participation and agreement of defendant and two or more other persons. The uncontradicted evidence indicates that defendant held a leadership position in the gang and the murder was motivated by defendant's leadership position. The error in not submitting the enhancement issue to a jury is harmless beyond a reasonable doubt.

Finally, defendant contends that the imposition of an extended-term sentence in this case violated his right to a jury trial as guaranteed by the *Illinois* constitution. He suggests that this right is broader than that guaranteed by the federal constitution and such a violation is not subject to a harmless-error analysis. Defendant's argument is interesting insofar as it begins with the relatively new federal rule of procedure announced in *Apprendi*—a rule which we had never recognized as required by *our* state constitution—and not only assumes we would find such a requirement in Illinois' constitution, but also urges us to hold that its violation is not amenable to harmless-error analysis.

In fact, an examination of our decisions over the decades suggests no such requirement. With the ex-

ception of death penalty cases, the long-standing procedure in Illinois has been for *judges* to make sentencing determinations, including the finding of facts necessary to support the sentences. Multitudes of such cases predate the 1970 Illinois constitution, and we have to assume the framers were aware of them. Thus, when the defendant cites article I, section 13, of the Illinois Constitution, wherein it is stated that "[t]he right of trial by jury as *heretofore* enjoyed shall remain inviolate" (emphasis added) (Ill. Const.1970, art. I, § 13), the right of which he speaks was apparently not one which included jury participation in the sentencing phase of noncapital cases.

This court, in *People v. Adkins,* 41 Ill.2d 297, 242 N.E.2d 258 (1968), made it clear that sentencing in noncapital cases was a procedure distinct from the adversary proceeding of a jury trial, and with different evidentiary rules and standards:

> "In Illinois, * * * we have long held that the judge in determining the character and extent of punishment is not limited to considering only information which would be admissible under the adversary circumstances of a trial." *Adkins,* 41 Ill.2d at 300, 242 N.E.2d 258.

The rules did not change with the advent of extended-term sentencing in the early 1970s. In *People v. La Pointe,* 88 Ill.2d 482, 59 Ill.Dec. 59, 431 N.E.2d 344 (1981), a case involving extended-term sentencing, this court quoted the Supreme Court itself in differentiating between the evidentiary rules then applicable to *trial* procedures and *sentencing* procedures: "'In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction.'" *La Pointe,* 88 Ill.2d at 496, 59 Ill.Dec.

59, 431 N.E.2d 344, quoting *Williams v. New York,* 337 U.S. 241, 246-51, 69 S.Ct. 1079, 1083-85, 93 L.Ed. 1337, 1342-44 (1949). Relevance and reliability were the touchstones for admissibility (*People v. Fern,* 189 Ill.2d 48, 67, 243 Ill.Dec. 175, 723 N.E.2d 207 (1999)), and the reasonable doubt standard that emerged from *Apprendi* was not a part of noncapital sentencing in this state prior to that decision; nor was the requirement that the *trier of fact* make findings pertinent to sentencing.

In *La Pointe,* this court considered the constitutionality of one of the very enhancement factors argued by the State in this case. In *La Pointe,* defendant challenged the constitutionality of section 5-8-1(a)(1) (Ill.Rev.Stat., 1978 Supp., ch. 38, par. 1005-8-1(a)(1)), which authorized natural life imprisonment when "the court" found a defendant's conduct to be "exceptionally brutal or heinous behavior indicative of wanton cruelty." *La Pointe,* 88 Ill.2d at 499, 59 Ill.Dec. 59, 431 N.E.2d 344. Defendant argued that the statute was unconstitutionally vague and therefore violated due process requirements; he also argued that the felony sentencing scheme, which offered the prospect of release to every offender sentenced to a term of imprisonment excepting a small class of murder defendants, violated equal protection of the law. *La Pointe,* 88 Ill.2d at 499, 59 Ill.Dec. 59, 431 N.E.2d 344. It likely never occurred to him, or any other defendants, or the legislature, that a *sentencing court* could not, constitutionally, make findings bearing upon sentence enhancement. The only requirement was that the court advise the defendant, initially, of the possible sentences he could face, including extended-term sentences, upon proof of certain aggravating facts.

In response to *Apprendi,* the Illinois legislature changed section 1005-8-1(a)(1) to require the "trier of fact" to find an enhancement factor "beyond a reasonable doubt." See 730 ILCS 5/5-8-1(a)(1) (West 2000). The legislature clearly felt no need to make those changes prior to the Supreme Court's decision in *Apprendi,* because it was taken for granted that the *judge* was the sentencing fact finder in noncapital cases prior thereto.

We have considered defendant's extensive argument on this issue, and we reject his contention that the Illinois constitution affords rights beyond its federal counterpart in this respect. We see no appreciable difference between the rights guaranteed by the federal and state constitutions. As we noted recently in *People v. Taylor,* 221 Ill.2d 157, 169, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006)

> "Both our federal and state constitutions preclude a criminal felony conviction without the right to a jury trial. Specifically, the sixth amendment to the United States Constitution states that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' U.S. Const., amend. VI. Similarly, our state constitution provides that '[i]n criminal prosecutions, the accused shall have the right * * * to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.' Ill. Const.1970, art. I, § 8."

Although the harmless-error analysis we used in *Thurow* was based on United States Supreme Court precedents interpreting the right to a jury trial guaranteed by the *federal* constitution, we find nothing in our own constitution, or our precedents, which would

cause us to interpret the Illinois constitution differently. Therefore, assuming, *arguendo*, that the Illinois constitution requires a "trier of fact" to make findings bearing upon sentence enhancement "beyond a reasonable doubt," we conclude that any violation of the right to a jury trial guaranteed by the Illinois constitution was harmless for the same reasons discussed in *Thurow*.

For the foregoing reasons, we affirm the judgment of the appellate court—though not the entirety of its analysis—insofar as that judgment affirmed the judgment of the circuit court.

Affirmed.

Chief Justice THOMAS and Justices FREEMAN, FITZGERALD, KILBRIDE, GARMAN, and BURKE concurred in the judgment and opinion.

PETITIONER'S BRIEF

114

(2)

Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court for the State of Illinois

BRIEF OF THE PETITIONER

ROBERT N. HOCHMAN
AARON S. MANDEL
JEREMY G. MALLORY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

December 5, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 472XJ9

QUESTION PRESENTED

Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. TRIAL BEFORE AN UNLAWFUL ADJUDICATOR IS STRUCTURAL ERROR	11
A. This Court Has Consistently Reversed Judgments Without Conducting Harmless-Error Review When There Was Error In The Composition Of The Tribunal	13
B. Trial Before An Unlawful Adjudicator Violates Due Process	19
II. THE WRONGFUL SEATING OF A JUROR IS STRUCTURAL ERROR BECAUSE HARMLESS-ERROR REVIEW IS IMPOSSIBLE TO CONDUCT	20
III. THE SEATING OF A JUROR WHOM THE DEFENDANT HAS LAWFULLY STRUCK IS STRUCTURAL ERROR BECAUSE IT CREATES AN UNACCEPTABLE RISK OF BIAS	26

TABLE OF CONTENTS continued

Page

A. Automatic Reversal Is Required When The Proceeding Involved An Unacceptable Risk Of Bias In Its Adjudication 27

B. Seating A Juror Who Has Been Lawfully Stricken Pursuant To A Defendant's Peremptory Challenge Creates An Unacceptable Risk Of Bias That Violates Due Process 28

CONCLUSION 39

TABLE OF AUTHORITIES

CASES Page

Am. Constr. Co. v. *Jacksonville Tampa & Key W. Ry.*, 148 U.S. 372 (1893) 20
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 2, 10
Ayrshire Colleries Corp. v. *United States*, 331 U.S. 132 (1947) 14, 16
Batson v. *Kentucky*, 476 U.S. 79 (1986) 6, 13, 30
Bd. of Regents v. *Roth*, 408 U.S. 564 (1972) ... 37
Berger v. *United States*, 295 U.S. 78 (1935) ... 15
California v. *Roy*, 519 U.S. 2 (1996) 24
Carella v. *California*, 491 U.S. 263 (1989) .. 24
Chapman v. *California*, 386 U.S. 18 (1967) ... 13
Douglas v. *California*, 372 U.S. 353 (1963) .. 38
Edmonson v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) 29
Estes v. *Texas*, 381 U.S. 532 (1965) 21
Evitts v. *Lucey*, 469 U.S. 387 (1985) 38
Frazier v. *United States*, 335 U.S. 497 (1948) 30
Georgia v. *McCollum*, 505 U.S. 42 (1992) ... 6, 12
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 14, 15
Gomez v. *United States*, 490 U.S. 858 (1989) ..... *passim*
Gray v. *Mississippi*, 481 U.S. 648 (1987) 13, 27
Hayes v. *Missouri*, 120 U.S. 68 (1887) 30, 35
Hedgpeth v. *Pulido*, No. 07-544 (Dec. 2, 2008) 24, 25
Hicks v. *Oklahoma*, 447 U.S. 343 (1980) 37, 38
Holland v. *Illinois*, 493 U.S. 474 (1990) 28, 30
Holloway v. *Arkansas*, 435 U.S. 475 (1978) ... 21

TABLE OF AUTHORITIES continued

Page

In re Murchison, 349 U.S. 133 (1955)..... 14, 27
Irvin v. *Dowd*, 366 U.S. 717 (1961) 13
J.E.B. v. *Alabama*, 511 U.S. 127 (1994)..... 12, 30, 33, 34
Jones v. *United States*, 526 U.S. 227 (1999)... 17
Kansas v. *Marsh*, 548 U.S. 163 (2006) 19
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)..... 37
McDowell v. *United States*, 159 U.S. 596 (1895)..... 14
McIlwain v. *United States*, 464 U.S. 972 (1983)..... 22
McKane v. *Durston*, 153 U.S. 684 (1894) 38
Michigan v. *Long*, 463 U.S. 1032 (1983) 18, 19
Moran v. *Dillingham*, 174 U.S. 153 (1899).. 14
Neder v. *United States*, 527 U.S. 1 (1999).....8, 24, 25, 29
Nguyen v. *United States*, 539 U.S. 69 (2003)..... 14
Offutt v. *United States*, 348 U.S. 11 (1954).. 27
Patton v. *Yount*, 467 U.S. 1025 (1984)..... 31
People v. *Nitz*, 848 N.E.2d 982 (Ill. 2006).... 8
People v. *Rivera*, 879 N.E.2d 876 (Ill. 2007). 1
People v. *Thurow*, 786 N.E.2d 1019 (Ill. 2003)..... 8
Peters v. *Kiff*, 407 U.S. 493 (1972)... 13, 22, 27, 36
Pointer v. *United States*, 151 U.S. 396 (1894)..... 31
Pope v. *Illinois*, 481 U.S. 497 (1987)..... 25
Powers v. *Ohio*, 499 U.S. 400 (1991)..... 17, 34, 35
Ross v. *Oklahoma*, 487 U.S. 81 (1988) 30, 32
Sullivan v. *Louisiana*, 508 U.S. 275 (1993)..... 21, 26

TABLE OF AUTHORITIES continued

Page

Swain v. *Alabama*, 380 U.S. 202 (1965).. 7, 12, 29
Thiel v. *S. Pac. Co.*, 328 U.S. 217 (1946)..... 13
Tumey v. *Ohio*, 273 U.S. 510 (1927)..... 14, 27, 28
Turner v. *Louisiana*, 379 U.S. 466 (1965)... 28
United Bhd. of Carpenters v. *United States*, 330 U.S. 395 (1947)..... 26
United States v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685 (1960)..... 14, 16
United States v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1996)..... 22, 23
United States v. *Dominguez-Benitez*, 542 U.S. 74 (2004)..... 11
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006)..... 11, 21, 24, 34
United States v. *Harbin*, 250 F.3d 532 (7th Cir. 2001)..... 36
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977)..... 26
United States v. *Martinez-Salazar*, 528 U.S. 304 (2000).....7, 30, 32, 38
United States v. *Olano*, 507 U.S. 725 (1993)..... 22
United States v. *Va. Erection Corp.*, 335 F.2d 868 (4th Cir. 1964)..... 22
Vasquez v. *Hillery*, 474 U.S. 254 (1986)..... 13, 16, 17, 22, 28
Wainwright v. *Witt*, 469 U.S. 412 (1985)..... 32
Wardius v. *Oregon*, 412 U.S. 470 (1973) 36
William Cramp & Sons Ship & Engine Bldg. Co. v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913)..... 20, 23, 26
Wingo v. *Wedding*, 418 U.S. 461 (1974) .....*passim*
Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)..... 15, 16, 17, 18

TABLE OF AUTHORITIES continued

CONSTITUTIONS AND RULES Page

U.S. Const. amend. VI 1
U.S. Const. amend. XIV, § 1 1
Fed. R. Crim. P. 23(b), 1983 Advisory Comm. Notes 22
Fed. R. Crim P. 24(b) 31
Fed. R. Evid. 606(b), 1972 Advisory Comm. Notes, 1974 Notes, & 2006 Amends. 22
Ill. Sup. Ct. R. 434(d) 11

SCHOLARLY AUTHORITIES

Rebecca White Berch, *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 Fordham L. Rev. 347 (1990) 33
William Blackstone, *Commentaries* (1765). 29
Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan L. Rev. 545 (1975) 31
William W. Van Alstyne, *The Constitution in Exile: Is It Time to Bring It in From the Cold?*, 51 Duke L.J. 1 (2001) 30

OTHER AUTHORITIES

Judee K. Burgoon & Aaron E. Bacue, *Nonverbal Communication Skills, in Handbook of Communication and Social Interaction Skills* (John O. Green, Brant R. Burleson eds., 2003) 33

TABLE OF AUTHORITIES continued

Page

Alfred Friendly & Ronald Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* (1967) 31

Albert Mehrabian, *Silent Messages: Implicit Communication of Emotions and Attitudes* (2d ed. 1981) 33

David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, *State Court Organization, 2004* (2006) http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf 31, 36

Roger J. Traynor, *The Riddle of the Harmless Error* (1970) 23

OPINIONS BELOW

The decision of the Illinois Supreme Court under review is reported at *People* v. *Rivera*, 879 N.E.2d 876 (Ill. 2007) and reproduced in the Joint Appendix at JA 144-76. The previous decision of the Illinois Supreme Court is reported at 852 N.E.2d 771 (Ill. 2006) and reproduced at JA 94-133. The opinion of the Illinois Appellate Court is reported at 810 N.E.2d 129 (Ill. App. Ct. 2004) and reproduced at 63-93. The judgment of the Circuit Court of Cook County is unreported. It is reproduced at JA 61-62.

JURISDICTION

The opinion and judgment of the Illinois Supreme Court was entered on November 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[ ] by an impartial jury[.]

U.S. Const. amend. VI.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A Cook County jury found petitioner guilty of first-degree murder in the shooting death of Marcus Lee. The foreperson, Delores Gomez, should never have been seated on the jury. Petitioner's trial counsel attempted to use one of his peremptory challenges during voir dire to excuse Ms. Gomez. But the trial court erroneously refused to dismiss her. Petitioner was thus found guilty by a tribunal that included an illegitimate juror. The Illinois Supreme Court nonetheless refused to order a new trial because it concluded that the error was harmless.

The Illinois Supreme Court erred. A trial before a defectively constituted tribunal is the very essence of structural error: it "affect[s] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 309-10 (1991). This Court has consistently so held, ordering reversal automatically whether the defect concerns the judge, judicial panel, or jury.

Further, the nature of this error makes review for harmlessness impossible. Appellate review for harmlessness is no replacement for the first-hand evaluation of the testimony and evidence by a panel of lawful jurors. The kind of plenary consideration of the whole record that might be attempted (and was performed by the Illinois Supreme Court here) would violate the Sixth Amendment right to a jury trial.

Finally, the erroneous denial of defense counsel's exercise of a peremptory challenge produced not only an unlawful adjudicator, but also created an unacceptable risk of bias in the resolution of the proceedings. Our legal tradition has long acknowledged that the criminal defendant's right to have defense counsel exercise his or her judgment regarding prospective jurors is part of the process of

insuring trial before a fair tribunal. By denying petitioner the lawful effect of his trial counsel's judgment, the State fundamentally altered the structure of the trial in violation of the Due Process Clause of the Fourteenth Amendment. For this further reason, automatic reversal is required.

1. Marcus Lee was shot to death on the evening of January 10, 1998. JA 64. The government alleged that petitioner was a gang enforcer, and that petitioner shot Lee in the mistaken belief that Lee was a member of a rival gang. JA 64.

Jury selection took place on August 7, 2000. When Delores Gomez was seated in the jury venire, she was initially questioned by the court. JA 28-32. In response to the court's questions, Ms. Gomez indicated that she had been working at Cook County Hospital for 22 years. JA 29. Petitioner's trial counsel further questioned Ms. Gomez. Ms. Gomez indicated that she works as a "business office supervisor" in an out-patient orthopedic clinic of the hospital. JA 32. Counsel discussed with Ms. Gomez the fact that Cook County Hospital treats numerous patients for gunshot wounds, and inquired into whether she has contact with patients at the hospital. JA 32. Ms. Gomez indicated that she has direct contact with patients in her clinic. JA 32. Ms. Gomez further indicated that her experiences at the hospital would not prevent her from judging fairly the evidence regarding an alleged shooting. JA 32-33.

At the completion of the questioning, counsel for petitioner, in open court and in front of the assembled venire, asked to have Ms. Gomez excused from service. JA 33. Counsel for respondent did not assert that the challenge was objectionable. The court, however, did not excuse Ms. Gomez. Instead the court *sua sponte* called all counsel, and petitioner, into

chambers. JA 33-34. Ms. Gomez remained in the jury box at this time. JA 33.

In chambers, the trial court asked petitioner's counsel to articulate the reason why he was choosing to strike Ms. Gomez from the jury. JA 34. Trial counsel indicated that he was concerned that Ms. Gomez works at a hospital that treats an extraordinarily high number of gunshot victims, and that she might routinely see such victims come through the orthopedic clinic at the hospital. JA 34. Trial counsel further explained that he was "pulled in two different" directions with regard to this juror, because she has an Hispanic surname (like petitioner). JA 34.

After the court interrupted petitioner's counsel to state its impression that Ms. Gomez "appears to be an African American female," it asked to hear from the State. JA 34. Without addressing petitioner's counsel's concern about Ms. Gomez's exposure to gunshot victims, counsel for the State expressed his view that "the offered cause for Ms. Gomez is [not] a sufficient reason to excuse her as a juror." JA 34-35. Shortly thereafter, the State expressly asked to have Ms. Gomez "impaneled as a juror." JA 35.

The court then ruled that Ms. Gomez should be seated. JA 35-41. The court noted that (assuming Ms. Gomez is an African-American female) this was the second African-American female trial counsel had excused pursuant to a peremptory challenge, ignoring trial counsel's observation that another African-American female had already been impaneled. JA 35. The trial court concluded that the peremptory challenge as to Ms. Gomez was discriminatory. JA 36. Petitioner's counsel objected to the trial court's ruling. JA 36.

Petitioner's trial counsel asked and was granted the opportunity to question Ms. Gomez further. JA 36. Ms. Gomez was brought into chambers. Ms. Gomez clarified that her clinic is a building that is separate from, but close to, the main hospital building. JA 37-38. Ms. Gomez confirmed counsel's surmise that some of the patients she sees are victims of gun violence. JA 38.

After Ms. Gomez was excused and returned to the courtroom, petitioner's trial counsel informed the court that he had been to the clinic where Ms. Gomez works, and that "[i]t's wall to wall victims and patients coming in there, and I could see it's a disturbing place for me to be there when I've been there." JA 40. Counsel for petitioner thereafter repeated his request to strike Ms. Gomez. The trial court chose not to change its prior ruling and "overr[o]de [petitioner's] peremptory challenge as to Ms. Gomez." JA 39-40.

Ms. Gomez was seated as a juror with full knowledge that petitioner's counsel had sought to have her excluded from service. She was selected as the foreperson of the jury. JA 43-44. At the conclusion of the trial, the jury found petitioner guilty, and the trial court sentenced him to 85 years in prison. JA 61-62.

2. The Illinois Appellate Court affirmed petitioner's conviction and sentence, rejecting his contention that the trial judge erred in denying his peremptory challenge to Ms. Gomez. JA 63-79. As relevant, the appellate court ruled that the trial court had not "manifestly" erred in concluding that petitioner's trial counsel had "engaged in purposeful discrimination" in attempting to excuse Ms. Gomez from the jury. JA 79. It thus upheld the trial court's rejection of petitioner's peremptory challenge under the authority

of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and *Georgia* v. *McCollum*, 505 U.S. 42 (1992).

The Illinois Supreme Court did not affirm in its initial review. Instead, it remanded the case to the trial court to give the trial judge the opportunity to more fully "articulate the bases for his *Batson* rulings." JA 132. Based on the record before it at that time, the Illinois Supreme Court could not discern from the trial court's decision whether there was a sufficient prima facie case of discrimination, or even what the alleged basis of discrimination was (race or gender or something else) to warrant rejecting counsel for petitioner's peremptory challenge to Ms. Gomez. JA 130-32. That is, the Illinois Supreme Court recognized that petitioner's trial counsel should not have been asked to articulate a reason for his peremptory challenge to Ms. Gomez unless the record, when he initially sought to strike her, established a prima facie case of discrimination. JA 122-23.

On remand, the trial judge attempted to articulate some prima facie case of discrimination as of the time petitioner's trial counsel first sought to exclude Ms. Gomez from the jury. Six years after the events at issue, the trial court stated that he had believed that petitioner's trial counsel "was seeking to excuse Mrs. Gomez because she in fact was a woman." JA 136.

After considering the supplemented record, the Illinois Supreme Court concluded that petitioner's peremptory challenge to Ms. Gomez should have been honored. The "record [on remand] fail[ed] to support a *prima facie* case of discrimination *of any kind*." JA 157. Petitioner's trial counsel should never have been required to explain his rationale for excluding Ms. Gomez. Further, the Illinois Supreme Court concluded that "the fact that she had frequent contact

with gunshot victims seems to us a valid reason why defense counsel might want to excuse her." JA 157. Ms. Gomez should not have sat on the jury.

3. The Illinois Supreme Court nonetheless affirmed petitioner's conviction. It held that the error here does not require automatic reversal, and was harmless.

The Illinois Supreme Court believed that decisions of this Court, and its own decisions relying on this Court's rulings, resolve the question whether harmless-error analysis or automatic reversal applies. JA 158. Though acknowledging the central role of peremptory challenges in ensuring the fairness of jury trials throughout the nation's history, JA 158-59, the Illinois Supreme Court concluded that this Court made clear in *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000), that it "no longer considers peremptory challenges indispensable to a fair trial or their erroneous denial a matter necessarily requiring reversal." JA 159; JA 163 (concluding that *Martinez-Salazar* left nothing to implication and that the adoption of the harmless-error rule was "explicit").

In *Swain* v. *Alabama*, this Court had stated that the "denial or impairment of the right [to exercise a peremptory challenge] is reversible error without a showing of prejudice." 380 U.S. 202, 219 (1965), *overruled in part on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986). In *Martinez-Salazar*, this Court characterized *Swain*'s statement as "unnecessary to the decision in that case" and "founded on a series of our early cases decided long before the adoption of harmless-error review." 528 U.S. at 317 n.4. The Illinois Supreme Court read that footnote as "signaling that [*Swain*'s] legal proposition

is no longer good law in the age of 'harmless-error review.'" JA 162.

In addition to following what it perceived to be the mandate of *Martinez-Salazar*, the Illinois Supreme Court concluded that the error at issue here is not "structural" under this Court's decisions because "the erroneous denial of a peremptory challenge has not been included" on any list of structural errors this Court has recited. JA 163. Because Ms. Gomez had not been challenged for cause, the Illinois Supreme Court concluded that this case was different from one involving trial before a biased judge or jury, which it acknowledged would require automatic reversal. JA 163-64.

The Illinois Supreme Court also rejected the assertion that harmless-error analysis should not apply because the error is not the sort that can be assessed for harm. Relying on this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), and its subsequent decisions relying on *Neder* (*People* v. *Thurow*, 786 N.E.2d 1019 (Ill. 2003), and *People* v. *Nitz*, 848 N.E.2d 982 (Ill. 2006)), the Illinois Supreme Court believed it was permitted to "qualitatively assess for harm Gomez's presence on the jury[ ] by applying the rational juror standard to the evidence adduced against defendant. If the evidence is so overwhelming that no rational jury or juror would have acquitted the defendant of the offense, then Gomez's presence on the jury cannot be said to have prejudiced [petitioner]." JA 166.

The Illinois Supreme Court then applied that standard to the record. Based on its review of the paper record, the Illinois Supreme Court concluded that "[a]ny inconsistencies in the witnesses' grand jury testimony were insignificant when compared" to what it deemed "compelling" testimony. JA 166-71. It

declared that the evidence of guilt was "overwhelming." JA 171. Ms. Gomez's unlawful participation in the proceedings as foreperson of the jury was thus deemed harmless.

SUMMARY OF ARGUMENT

Petitioner was tried before a jury that included an individual who was empanelled contrary to law. The conviction rendered by that jury must be automatically reversed for three distinct reasons.

First, the error is quintessentially structural. Ms. Gomez's authority to participate as a juror was voided by petitioner's lawful exercise of a peremptory challenge. This Court has consistently ordered reversal of judgments in cases involving improperly constituted tribunals. Whether the error goes to the propriety of the judge presiding over a trial, or the construction of a judicial panel or a jury, automatic reversal has been the unwavering rule. It has not mattered if the error raised concerns regarding any potential bias in the tribunal. The lack of lawful authority to render judgment has been sufficient to require reversal. For this reason alone, this Court should reverse petitioner's conviction.

Second, a court cannot review the record for harmlessness when the trial included an unlawful adjudicator. There is no way to know how the jury's deliberations would have been different if Ms. Gomez had been excluded. Jury deliberations are secret. And even if they were not, it still would be impossible to know who the replacement juror would have been, much less how that juror might have affected the deliberations. Appellate review for harmlessness is no replacement for the consideration of a panel composed of lawful jurors. As the Illinois Supreme Court's opinion makes clear, a court reviewing for

harmlessness would be required to engage in wholesale review of the record and render its own independent judgment regarding the prospects of acquittal before a hypothetical reasonable (and properly constituted) tribunal. This is the equivalent of an impermissible directed verdict of guilt on every element of the offense in violation of the Sixth Amendment right to trial by jury. For this reason as well, automatic reversal is required.

Third, automatic reversal is warranted because the error created a sufficient risk of jury bias. Ms. Gomez sat on petitioner's jury because the trial court refused his lawful peremptory challenge to her. For centuries, the peremptory challenge has been understood as aimed at ensuring a fair and impartial jury. It empowers counsel for the parties to reject those who they believe would be unfair, so long as the exclusion is not based on invidiously discriminatory criteria. In asserting a peremptory strike, the defendant expresses doubt about the fairness of the juror who is the object of the challenge. By granting the defendant the right to use peremptory challenges, the State encouraged petitioner to express his concerns about Ms. Gomez under the expectation that his concerns would be respected and Ms. Gomez would be dismissed. Instead, the State, with full knowledge of petitioner's concerns, empanelled her. This process created an unacceptable risk of bias in the tribunal that both violates due process and requires automatic reversal.

ARGUMENT

This Court has recognized a distinction between "trial errors" and "structural defects." *Fulminante*, 499 U.S. at 307-08. Trial errors are subject to harmless-error review; structural defects are not, and

require automatic reversal. *United States* v. *Dominguez-Benitez*, 542 U.S. 74, 81 (2004).

Trial errors "'occur[ ] during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-08) (second alteration in original). By contrast, structural defects "'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *Id.* (alteration in original).

Here a juror participated in rendering a verdict of guilt despite the fact that petitioner lawfully voided her as a juror through his peremptory challenge. This was a structural defect at the center of the "'framework within which the trial proceeds.'" *Id.* (quoting *Fulminante*, 499 U.S. at 309-10). It cannot be trial error because the error cannot "'be quantitatively assessed in the context of other evidence presented in order to determine'" harmlessness. *Id.*

I. TRIAL BEFORE AN UNLAWFUL ADJUDICATOR IS STRUCTURAL ERROR.

Petitioner had the right to a trial in which Ms. Gomez did not sit on his jury. Illinois law provides seven peremptory challenges to defendants charged with a non-capital felony. Ill. Sup. Ct. R. 434(d). Petitioner's counsel, based on his personal experience and questioning of Ms. Gomez, determined not to bear the risk that Ms. Gomez's past exposure to victims of gun violence would bias her against petitioner, who had been charged with shooting Mr. Lee. JA 33-34.

Even inquiring into the reason why trial counsel chose to strike Ms. Gomez is an intrusion on the right to a peremptory challenge. The right includes the right *not* to have to explain one's reasons for excluding a juror, *Swain*, 380 U.S. at 220 ("[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control"), at least in the absence of a prima facie case that the peremptory strike is based on any constitutionally impermissible criteria, see *McCollum*, 505 U.S. at 59 (racial discrimination in use of peremptory challenge impermissible); *J.E.B.* v. *Alabama*, 511 U.S. 127, 146 (1994) (gender discrimination in use of peremptory challenge impermissible). The Illinois Supreme Court held that there was no prima facie case of discrimination. JA 157.

Here, the intrusion on petitioner's right was complete. The trial court seated Ms. Gomez on the jury without any lawful basis to override petitioner's peremptory strike. Petitioner's lawful challenge to Ms. Gomez voided her as a juror; the jury that sat in judgment of petitioner was thus defectively constituted.

Ms. Gomez's participation as an unlawful adjudicator requires automatic reversal of petitioner's conviction. Denial of the right to have one's criminal trial adjudicated by those with lawful authority to do so can never be treated as harmless. *Gomez* v. *United States*, 490 U.S. 858, 876 (1989). When the factfinder in a proceeding acted without lawful authority, the only appropriate response of an appellate court is to remand the case so that the proceeding may be conducted before a legitimate tribunal. *Wingo* v. *Wedding*, 418 U.S. 461, 473-74 (1974), *overruled by*

statute in part as recognized in Gomez, 490 U.S. at 868 n.14.

A. This Court Has Consistently Reversed Judgments Without Conducting Harmless-Error Review When There Was Error In The Composition Of The Tribunal.

This Court has never conducted harmless-error review of a judgment rendered by an improperly constituted tribunal. Errors affecting the composition of the jury have consistently led this Court to reverse without review for harmlessness. Errors going to the propriety of the presiding judge or judicial panel and even the prosecutor have consistently led this Court to reverse without review for harmlessness. This rule predates the modern approach to harmless-error review ushered in by *Chapman* v. *California*, 386 U.S. 18 (1967), and it is has continued since. The rule applies beyond cases involving a concern that the tribunal is biased. And the rule applies even in the absence of a violation of any constitutional right.

Errors affecting the composition of the jury have consistently been held to require automatic reversal. *Gray* v. *Mississippi*, 481 U.S. 648, 660-68 (1987) (improper exclusion of juror with scruples regarding the death penalty from capital case); *Batson*, 476 U.S. at 100 (unlawful exclusion of jurors based on race); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986) (unlawful exclusion of grand jurors based on race); *Peters* v. *Kiff*, 407 U.S. 493, 505 (1972) (systematic exclusion from grand jury on basis of race requires automatic reversal regardless of race of defendant); *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961) (pretrial publicity calling into question jury's impartiality); *Thiel* v. *S. Pac. Co.*, 328 U.S. 217, 224-25 (1946) (exclusion from jury venire of hourly wage earners).

The same rule applies to errors regarding the propriety of a presiding judge. *Gomez*, 490 U.S. at 876 (judge without statutory authority to preside over voir dire); *Wingo*, 418 U.S. at 473-74 (magistrate without authority to preside over habeas corpus hearing); *In re Murchison*, 349 U.S. 133, 139 (1955) (same judge presiding over criminal contempt proceeding who presided over underlying proceeding); *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927) (judge with financial interest in outcome). Automatic reversal is required when a judicial panel was defectively constituted. *Nguyen* v. *United States*, 539 U.S. 69, 81-83 (2003) (vacating and remanding appellate ruling because one member of appellate panel was not life-tenured, Article III judge); *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960) (vacating decision of en banc panel because a retired judge impermissibly participated and expressly declining to consider the underlying merits of the case); *Ayrshire Colleries Corp.* v. *United States*, 331 U.S. 132, 144 (1947) (automatic reversal when only two judges participated on a panel and statute required three judges); *Moran* v. *Dillingham*, 174 U.S. 153, 158 (1899) (automatic reversal when, contrary to statute, appellate panel includes a judge who had presided in the cause of action in trial court).[1] And even though

[1] The only even arguable exception of which petitioner is aware concerns the so-called "de facto officer" doctrine, referred to in *Nguyen*, 539 U.S. at 77; *see McDowell* v. *United States*, 159 U.S. 596, 601-02 (1895). Not only does that doctrine apply only to "merely technical" defects, *Nguyen*, 539 U.S. at 77-80—and as discussed below, the defect here is not merely technical, *infra* at 19-20, 27-39 (violates due process), 25-26 (violates Sixth Amendment)—but the doctrine "is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden Co.* v. *Zdanok*,

the prosecutor is an advocate and not an adjudicator, the public interest in justice a prosecutor is obliged to pursue, see *Berger* v. *United States*, 295 U.S. 78, 88 (1935), makes that role a part of the tribunal in a criminal proceeding. This Court has held that errors regarding the choice of an individual to prosecute a crime also require automatic reversal. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 813-14 (1987) (plurality opinion) (reversing conviction when prosecutor had private interest in the proceeding); *id.* at 825 (Scalia, J., concurring).

As several of the cases illustrate, the automatic-reversal rule does not stem solely from a concern about any bias that may have affected the adjudication of the case. For example, in *Gomez*, this Court reversed a conviction when a magistrate was permitted to preside over voir dire without the consent of the defendant. The trial itself was not called into question. And the petitioner did not claim that any juror who was selected would have been different had a judge presided rather than a magistrate. Nonetheless, this Court reversed the conviction because the defendant was deprived of his "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Gomez*, 490 U.S. at 876.

In *Wingo*, this Court affirmed the reversal of a judgment in a habeas corpus proceeding because the hearing was presided over by a magistrate rather than a district judge. 418 U.S. at 473-74. There was no suggestion that the magistrate who presided over the hearing was biased. See *id.* at 466-67. The bare

370 U.S. 530, 535 (1962) (opinion of Harlan, J.). Petitioner immediately objected to Ms. Gomez sitting on his jury, and has sought redress by appeal at every stage of this litigation. Ms. Gomez did not act with de facto authority.

fact that the wrong person was appraising the evidence live and in the first instance warranted a new hearing. *Id.* at 473-74.

In *Ayrshire Colleries*, this Court reversed a ruling rendered by two judges when the statute required a three-judge panel, even though the law permitted the concurrence of two judges to control over a dissenting third. 331 U.S. at 139. And in *Am-Foreign*, this Court reversed an en banc ruling of an appellate court based on the improper participation of a retired judge even though retired judges indisputably were permitted to sit on three-judge panels. 363 U.S. at 687-88. There was no suggestion that the retired judge was ill-suited to serve for any reason other than the fact that the plain meaning of the statute prohibited his participation. *Id.* at 690-91.

Similarly, *Young* reversed a criminal conviction even though there was no suggestion that the adjudicator was biased. *Young* involved a conviction for criminal contempt based on a violation of a court's injunction. The court-designated prosecutors were the same attorneys who had previously obtained the injunction in question on behalf of private parties. 481 U.S. at 790-92. Certain of the offenders pled guilty, but others went to trial and were convicted by a jury. *Id.* at 792. The convictions were reversed even though there was no suggestion of any error in the trial. What mattered was that the prosecutor had a private interest in the enforcement of the injunction. *Id.* at 812.

Cases involving defectively composed juries are equally strict. In *Vasquez* and *Peters*, this Court held fast to a long line of cases, see *Vasquez*, 474 U.S. at 261 (citing cases), that reversed judgments based on defects in the composition of the *grand* jury, even though there was no challenge to the composition of

the petit jury that delivered the actual verdict of guilt. See *id.* at 272 (Powell, J., dissenting) ("the grand jury error did not affect the fairness of respondent's trial ... in any cognizable way"). Likewise, when racial discrimination in petit jury selection occurs, "[t]he composition of the trier of fact itself is called into question," *Powers* v. *Ohio*, 499 U.S. 400, 412-13 (1991), which "'casts doubt on the integrity of the judicial process,'" *id.* at 411 (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979)), separate and apart from any concern about bias in the tribunal.

Strict adherence to propriety in the construction of the foundational components of a trial cannot be compromised by harmless-error review. *Gomez*, 490 U.S. at 876; *Vasquez*, 474 U.S. at 264 (relying on the "overriding imperative to eliminate [a] systemic flaw in the charging process"); *Young*, 481 U.S. at 812. ("harmless-error analysis . . . would not be sensitive to the fundamental nature of the error committed"). And that the rule is as strict as applied to juries as it is to judges is hardly surprising. Our legal tradition has long treated judges and juries as equivalent in the respect that matters here: their power as adjudicators. *Jones* v. *United States*, 526 U.S. 227, 248 n.8 (1999) ("The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke.") (citing 1 Edward Coke, *Institutes of the Laws of England* 155b (1628)). Indeed, this Court has ordered a new hearing without regard to harmlessness when an unlawful judge (specifically, a magistrate) presided as the factfinder. *Wingo*, 418 U.S. at 473-74. The legal consequences of a proceeding adjudicated by an unlawful judge ought to be no different than the legal consequences of a

proceeding adjudicated by an unlawful juror. Both require automatic reversal.

Further, the rule requiring automatic reversal of a conviction involving an unlawful adjudicator applies even in the absence of a finding of a constitutional violation. In *Gomez*, this Court applied the automatic-reversal rule while also avoiding any constitutional inquiry by construing the federal statute governing referral of matters to magistrates to require a defendant's consent. 490 U.S. at 864-71. In *Wingo*, this Court reversed without regard to harmlessness even though the hearing was invalid not as a constitutional matter, but as a matter of the federal statutes (both the habeas corpus statute and the Magistrates Act) in effect at the time. 418 U.S. at 472-73.[2] Likewise, in *Young*, this Court applied an automatic reversal rule even though it avoided "reaching any constitutional issues" by relying on its supervisory authority to conclude that the appointment of the prosecutor in that case was error. 481 U.S. at 809 n.21.

In short, this case is readily resolved by this Court's unwavering rule: when the tribunal convened to render judgment includes an individual who by law should have been excluded, the judgment must be reversed without conducting harmless-error review. This Court need inquire no further.[3] Ms. Gomez had

[2] Indeed, Congress later provided the authority for magistrates to preside over habeas corpus proceedings that had been lacking. *See Gomez*, 490 U.S. at 867 n.14. This Court has never questioned the constitutionality of the authority expressly granted by Congress after *Wingo*.

[3] This Court's jurisdiction does not depend on deciding whether petitioner's due process rights were violated, and so this Court may dispose of this case on the narrow ground suggested above. Under *Michigan* v. *Long*, 463 U.S. 1032, 1040-

no more authority to serve on petitioner's trial without his consent in this case than the magistrate in *Gomez* had to preside over voir dire without the defendant's consent in that case. And Ms. Gomez had no more authority to evaluate the evidence presented at petitioner's trial than the magistrate in *Wingo* had to evaluate the evidence presented at the habeas corpus hearing. Petitioner's conviction should no more be allowed to stand than the conviction at issue in *Gomez* or than the judgment at issue in *Wingo*.

B. Trial Before An Unlawful Adjudicator Violates Due Process.

For the reasons stated above, it is unnecessary to determine whether permitting Ms. Gomez to sit on the jury violated any constitutional right. Still, if this Court were to consider the question, it should conclude that seating Ms. Gomez after she had been voided as a juror by petitioner's lawful peremptory challenge violated his right to due process.

Nothing could be more basic to the fundamental administration of justice than that proceedings be adjudicated only by those with lawful authority. This

41 (1983), this Court may review a state high court decision when, as here, that decision is not based on an independent and adequate state-law ground for its ruling. *See Kansas* v. *Marsh*, 548 U.S. 163, 169 (2006). The Illinois Supreme Court's ruling is expressly based on its interpretation of this Court's decisions in *Neder* and *Martinez-Salazar*. JA 160-66. The Illinois Supreme Court was applying its (mis)understanding of federal law regarding the applicability of automatic reversal and harmless-error analysis. In any event, as discussed below, petitioner's due process rights were violated when the trial court overrode his lawful peremptory challenge to Ms. Gomez and she participated in rendering a verdict of guilt. *See infra* at 19-20, 27-39. And the manner of harmless-error review the Illinois Supreme Court had to conduct violated petitioner's Sixth Amendment right to a jury trial. *See infra* at 25-26.

Court has expressly equated that basic right with the right to be tried before an impartial adjudicator. *Gomez*, 490 U.S. at 876. As discussed below, any trial before an adjudicator that is not impartial surely violates due process. *Infra* at 27-28. Therefore, a trial before a tribunal without lawful authority to adjudicate likewise violates due process.

Such a ruling would be consistent with this Court's longstanding treatment of unlawful adjudicators. An error that creates a panel of adjudicators without lawful authority to sit has been called "grave." *William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 650 (1913). Indeed, such an error renders the judgment a ruling by a court which is "virtually no court at all, because not organized in conformity to law." *Id.* at 652; *Am. Constr. Co.* v. *Jacksonville Tampa & Key W. Ry.*, 148 U.S. 372, 387 (1893) (stating that an appellate court decree issued by a panel that included a judge who by statute was "incompetent to sit at the hearing" is "unlawful, and perhaps absolutely void"). Trial before a lawful adjudicator is the very foundation of the legitimacy of a judgment of guilt; trial before an unlawful adjudicator, therefore, denies so "basic" a right that it violates due process. See *Gomez*, 490 U.S. at 876. Moreover, trial before a jury with an unlawful member is fundamentally unfair in violation of due process.

II. THE WRONGFUL SEATING OF A JUROR IS STRUCTURAL ERROR BECAUSE HARMLESS-ERROR REVIEW IS IMPOSSIBLE TO CONDUCT.

Certain errors require automatic reversal because harmless-error analysis cannot be performed after they occur. The unlawful seating of a juror is such an error. For this independent reason, petitioner's

conviction should be reversed without conducting harmless-error review.

This Court has deemed certain errors structural because of "the difficulty in assessing the effect of the error." *Gonzalez-Lopez*, 548 U.S. at 149 n.4. Such difficulty often stems from the fact that the nature of the error renders its impact "necessarily unquantifiable and indeterminate." *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993); *Estes* v. *Texas*, 381 U.S. 532, 542-44 (1965) (error in televising trial subject to automatic reversal and listing cases where "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced" as appropriate for automatic reversal).

For example, the denial of counsel of choice cannot be evaluated for harmlessness because the "myriad aspects of representation" (including, among other things, relationships with the prosecution, courtroom style, and, significantly, jury selection), which could conceivably and legitimately be handled differently by different counsel, would leave a reviewing court in the position of piling speculation on top of speculation about the impact. *Gonzalez-Lopez*, 548 U.S. at 150. Likewise, the joint representation of defendants with conflicting interests requires automatic reversal because the error often involves not what an advocate did on the record, but "what the advocate finds himself compelled to *refrain* from doing," such that "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway* v. *Arkansas*, 435 U.S. 475, 490-91 (1978).

This Court has observed the same with respect to errors affecting the composition of the jury. In *Vasquez*, this Court concluded that there was no way to determine whether racial bias in the selection of a

grand jury "infect[ed] the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Vasquez*, 474 U.S. at 263. In light of the "difficulty of assessing [the error's] effect on any given defendant," this Court adhered "to a rule of mandatory reversal." *Id.* at 264. *Vasquez* also observed that the "when a petit jury has been selected upon improper criteria . . . we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Id.* at 263 (citing *Davis* v. *Georgia*, 429 U.S. 122 (1976) (per curiam)).

The effect of the error here wrongfully seating Ms. Gomez on the jury cannot be ascertained. When the error goes to the composition of the jury, "there is no way to determine what jury would have been selected under a [lawful] selection system, or how that jury would have decided the case." *Peters*, 407 U.S. at 504. Like the denial of counsel of choice or trial with counsel laboring under a conflict of interests, the impact of the error is invisible. Jury deliberations are secret; there is no record of them. *United States* v. *Olano*, 507 U.S. 725, 738 (1993); *United States* v. *Va. Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964); see also Fed. R. Crim. P. 23(b), 1983 Advisory Comm. Notes; Fed. R. Evid. 606(b), 1972 Advisory Comm. Notes, 1974 Notes, & 2006 Amends. And even if they were not secret, a reviewing court could not possibly know who the replacement juror would have been, much less speculate about how that juror would have viewed the evidence and participated in deliberations. "Given the delicate dynamics of jury deliberations, it is simply impossible to know the effects [one] juror had on her fellow jurors." *McIlwain* v. *United States*, 464 U.S. 972, 975-76 (1983) (Marshall, J., dissenting from denial of certiorari); *United States* v. *Annigoni*, 96 F.3d 1132, 1150 (9th

Cir. 1996) (en banc) ("[T]he error is not amenable to normal harmless error analysis, as we can never figure out what would have happened if one member of the jury had been struck and replaced by some other, unknown, person.") (Kozinski, J., dissenting); Roger J. Traynor, *The Riddle of the Harmless Error* 64-66 (1970) (a defendant who has been wrongly denied a peremptory challenge cannot possibly show prejudice "and should not be called upon to do the impossible at the appellate stage").

The impossibility of speculating how a different factfinder would have evaluated the evidence is why this Court in *Wingo*, 418 U.S. at 473-74, required a fresh habeas corpus hearing, without considering whether the error was harmless, when the hearing under review had been unlawfully presided over by a magistrate rather than a judge. "'To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents.'" *Id.* at 474 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 520 (1958)). The fact that a district judge could review the proceedings de novo, including a recording of the testimony, 418 U.S. at 466, did not matter in *Wingo*. *Id.* When the error concerns "the mistaken organization of the court below," it is beyond the authority of an appellate court to undertake the harmless-error review conducted by the Illinois Supreme Court. *William Cramp & Sons*, 228 U.S. at 651. Review of a paper record is no substitute for the first-hand judgment of the lawful adjudicator to which petitioner is entitled.

The Illinois Supreme Court, relying on this Court's decision in *Neder*, concluded that harmless-error

review was, in fact, possible. JA 164-66. It reasoned that *Neder* authorizes harmless-error analysis whenever the error does not prevent the reviewing court from examining the record to determine whether "the evidence is so overwhelming that no rational jury or juror would have acquitted defendant of the offense." JA 166.[4] The Illinois Supreme Court has misread *Neder*.

Neder was based on this Court's precedents concerning improper instruction on an element of the offense. 527 U.S. at 12-13; see *Hedgpeth* v. *Pulido*, No. 07-544, slip op. at 3-4 (Dec. 2, 2008) (per curiam) (placing *Neder* in line of cases involving "various forms of instructional error" that "are not structural"). This Court had previously determined that defective instructions concerning an element of the offense could be reviewed for harmlessness. See *California* v. *Roy*, 519 U.S. 2, 5-6 (1996) (per curiam) (applying harmless-error review to misdescription of an element of a crime in habeas corpus proceeding); *Carella* v. *California*, 491 U.S. 263, 266-67 (1989) (per curiam) (reversing and remanding for state court to determine whether statutory presumptions were

[4] Elsewhere, the Illinois Supreme Court suggests that *Neder* authorizes harmless-error review whenever an error "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." JA 164 (quoting *Neder*, 527 U.S. at 9). In *Gonzalez-Lopez*, this Court expressly rejected the view that *Neder* establishes a single criterion for automatic reversal based exclusively on "'fundamental unfairness.'" 548 U.S. at 149 n.4. Regardless, for the reasons discussed above, trial before a tribunal with an unlawful adjudicator is fundamentally unfair, and, as discussed below, carries a sufficient risk of bias in the tribunal. Even *Neder* expressly recognized that the jury in Mr. Neder's case was "fairly selected." 527 U.S. at 9. Any fundamental unfairness standard is satisifed here.

harmless); *Pope* v. *Illinois*, 481 U.S. 497, 501-04 (1987) (finding harmless-error review applicable to misinstruction on constitutional element of First Amendment claim). *Neder* concluded that the failure to instruct on an element of the offense was indistinguishable from these misinstruction cases. 527 U.S. at 15 ("the matter is not *res nova* under our case law").

The Illinois Supreme Court's misreading of *Neder* is well illustrated by the manner in which it conducted harmless-error review here. The Illinois Supreme Court believed that it was permitted to conduct a wholesale evaluation of the entire record to determine whether a reasonable jury could have acquitted petitioner. JA 166-71. That review necessarily included the Illinois Supreme Court's own assessments of witness credibility seven years after trial and the weighing of inconsistencies against other evidence. JA 171. Even *Neder* disclaims the suggestion that it authorizes any such review. 527 U.S. at 11, 16 (emphasizing that "the jury-instruction error here did not 'vitiat[e] *all* the jury's findings'" and reviewing the record only with respect to the disputed element of the offense); see *Hedgpeth*, No. 07-544, slip op. at 4 (noting same limitation in *Neder*).[5] And such review is directly contrary to *Sullivan*. This Court unanimously held in *Sullivan*

[5] Likewise, *Neder* disclaims any suggestion that harmless-error analysis is warranted whenever a reviewing court determines that the evidence of guilt in the case is "overwhelming" and "uncontradicted," as the Illinois Supreme Court concluded here. JA 171-72. As *Neder* observed, the question whether to apply harmless-error analysis is decided on a "categorical" basis; an "error is either structural or it is not." 527 U.S. at 14. It is wrong to look at the quality or quantity of evidence in a particular case to determine whether to apply harmless-error analysis in that case.

that a defective reasonable doubt instruction, which does "vitiate *all* the jury's findings," is not reviewable for harmlessness because it is impermissible for a reviewing court to do precisely what the Illinois Supreme Court did here: "engage in pure speculation its view of what a reasonable jury would have done." 508 U.S. at 281.

As this Court observed in *Sullivan*, when a reviewing court simply takes it upon itself to consider the record as a whole, offering its own independent evaluation of whether a rational jury could have acquitted, it is directing a verdict of guilt. *Id.* at 277. In its manner of review, the Illinois Supreme Court went even further than impermissibly "exerting the powers of a court of first instance." *William Cramp & Sons*, 228 U.S. at 651. It did what no judge may do: replace the jury's authority to assess witness credibility and weigh inconsistencies in testimony. JA 166-71. The Illinois Supreme Court's harmless-error review thus violated petitioner's right to trial by jury under the Sixth Amendment. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) ("regardless of how overwhelmingly the evidence may point" toward guilt, a trial judge may not direct a verdict of guilt); *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947) ("a judge may not direct a verdict of guilty no matter how conclusive the evidence"). This Court, therefore, should reverse the Illinois Supreme Court's ruling.

III. THE SEATING OF A JUROR WHOM THE DEFENDANT HAS LAWFULLY STRUCK IS STRUCTURAL ERROR BECAUSE IT CREATES AN UNACCEPTABLE RISK OF BIAS.

In light of the long tradition of peremptory challenges in this country a tradition that still

commands universal acceptance and their recognized role in ensuring a fair trial, seating a juror who has lawfully been struck by the defendant renders a trial fundamentally unfair in violation of the Due Process Clause because it creates an unacceptable risk of bias in the proceedings and grants the state an undue influence over the composition of the jury. For this reason as well, the error requires reversal without conducting harmless-error review.

A. Automatic Reversal Is Required When The Proceeding Involved An Unacceptable Risk Of Bias In Its Adjudication.

There is no doubt that adjudication before a tribunal free of actual bias is a core element of due process. *In re Murchison*, 349 U.S. at 136 ("Fairness of course requires an absence of actual bias in the trial of cases."); *Tumey*, 273 U.S. at 523 ("it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty . . . to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case"). And beyond that, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). Thus, "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters*, 407 U.S. at 502 (citing cases).

This Court has not hesitated to reverse any conviction, without inquiring into harmlessness, obtained through a process that creates a likelihood or appearance of bias. When the error relates to "the impartiality of the adjudicator," it concerns "the very integrity of the legal system" and thus "harmless-error analysis cannot apply." *Gray*, 481 U.S. at 668;

see *Vasquez*, 474 U.S. at 263-64; *Tumey*, 273 U.S. at 535 ("No matter what the evidence was against him, he had the right to have an impartial judge."). Thus in *Turner* v. *Louisiana*, 379 U.S. 466, 473-74 (1965), this Court reversed a conviction automatically because jurors were sequestered with deputies who were chief witnesses for the prosecution. This Court did not demand any demonstration that the members of the jury had discussed the case with those witnesses. "[E]ven if it could be assumed that the deputies never did discuss the case directly with any members of the jury," the risk that the jurors had been influenced by the "continuous and intimate association" with the witnesses rendered the trial unfair. *Id.* When an error undermines confidence in the fairness of the adjudicator, automatic reversal is required.

B. Seating A Juror Who Has Been Lawfully Stricken Pursuant To A Defendant's Peremptory Challenge Creates An Unacceptable Risk Of Bias That Violates Due Process.

The purpose of peremptory challenges is to promote the selection of a fair and impartial jury by permitting counsel (for both the prosecution and defense) to use their judgment to exclude those whom they believe will be most favorable to the other side. *Holland* v. *Illinois*, 493 U.S. 474, 484 (1990). What occurred here took a venerable process that promotes fairness, and inverted it. The trial court practice followed here required defense counsel to indicate, in front of Ms. Gomez herself, that he had sufficient concerns about her fairness as a juror to exclude her entirely. Rather than respect the lawful judgment of defense counsel, the State (acting through both the judge and prosecutor) mandated Ms. Gomez's

participation after being apprised of petitioner's counsel's concerns. Because the law respected petitioner's counsel's judgment sufficiently to empower him to exclude Ms. Gomez from the jury based on his view that she presented an unacceptable risk of unfairness, seating her should be deemed to create an unacceptable risk of unfairness that violates due process and requires automatic reversal. Unlike in *Neder*, the jury that adjudicated Mr. Rivera's case was not "fairly selected." 527 U.S. at 9.

1. As this Court has observed, peremptory challenges "date as far back as the founding of the Republic[,] and the common-law origins of peremptories predate that." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621 (1991); see *Swain*, 380 U.S. at 212 n.9. Blackstone spoke of the right to challenge individual jurors in terms that directly compared it to the *recusatio judicis* by which both the civil and canon laws allowed a judge to be challenged for partiality. William Blackstone, 3 *Commentaries* *361 (1765). Among the methods Blackstone recognized for achieving the end of an impartial adjudication were challenges *propter affectum* ("for suspicion of bias or partiality"), *id.*, which could be undertaken in a peremptory manner, 4 *Commentaries* *353. The rationale for the peremptory challenge included the belief that no person should be tried by "someone against whom he has conceived a prejudice," and also was based on a desire to allow the defendant to strike a juror who might resent the inquiry into his impartiality. *Id.* In short, the common law allowed peremptory challenges so that a defendant could be assured that he has had every opportunity to secure a fair trial before an impartial jury.

The connection between peremptory challenges and jury impartiality at the time of the framing was so

close that Patrick Henry and George Mason challenged James Madison over the lack of details for peremptory challenges in the Constitution and Bill of Rights. Madison replied, "The right of challenging is incident to the trial by jury, and therefore, as the one is secured, so is the other." William W. Van Alstyne, *The Constitution in Exile: Is It Time to Bring It in From the Cold?*, 51 Duke L.J. 1, 17 (2001).

This Court, too, has long acknowledged the close connection between the peremptory challenge and a fair trial by an impartial jury. In the late 19th century, this Court observed that "[e]xperience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge." *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887). More recent cases have routinely commented on the connection between the peremptory challenge right and the right to a fair and impartial jury. A veritable chorus of decisions proclaim that the right has "been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson*, 476 U.S. at 91; see also *Martinez-Salazar*, 528 U.S. at 307 ("one means to achieve the constitutionally required end of an impartial jury"); *Holland*, 493 U.S. at 484 (peremptory challenges support "the selection of a qualified and unbiased jury"); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) ("a means to achieve the end of an impartial jury"); *J.E.B.*, 511 U.S. at 137 n.7 ("'one state-created means to the constitutional end of an impartial jury and a fair trial'") (quoting *McCollum*, 505 U.S. at 57); *Frazier* v. *United States*, 335 U.S. 497, 505 (1948) (peremptory challenges "given in aid of the party's interest to secure a fair and impartial jury").

More than a century ago this Court observed that peremptory challenges are "one of the most important

of the rights secured to the accused." *Pointer* v. *United States*, 151 U.S. 396, 408 (1894). And their persistence remains a strong indication of their continuing value to the administration of justice. Every state in the Union, and the District of Columbia, and the United States all provide a criminal defendant with the opportunity to exercise peremptory challenges during jury selection. David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, *State Court Organization, 2004*, at 228-31, tbl.41 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf (collecting rules regarding peremptory challenges in all 50 states and the District of Columbia); Fed. R. Crim P. 24(b).

Part of the reason peremptory challenges have remained so important to securing a fair trial before an impartial tribunal is that actual bias is rarely obvious. It is often difficult for counsel and client suspicious of bias to extract from a prospective juror the kind of statements that would support dismissal for cause. It is "unlikely that a prejudiced juror would recognize his own prejudice or knowing it, would admit it." Alfred Friendly & Ronald Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* 103 (1967); Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan L. Rev. 545, 549-52 (1975). And statements that arguably reveal prejudice are often not deemed sufficient to overcome other statements by the same prospective juror that he or she can put aside any prior experiences or preconceived notions and judge the case based exclusively on the evidence presented. *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984) (The partiality of a juror is "plainly [a question] of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case

on the evidence, and should the juror's protestation of impartiality have been believed").

Just as important, the standard of dismissal for cause is both demanding and leaves the trial court with broad discretion.

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright v. *Witt*, 469 U.S. 412, 424-26 (1985). For all practical purposes, when it comes to for-cause challenges, counsel is at the mercy of the judgment of the trial court. If counsel believes the trial court has erred and refused to dismiss a juror when it should have, the peremptory challenge provides an immediate opportunity to "correct" the error. *Martinez-Salazar*, 528 U.S. at 315-16; *Ross*, 487 U.S. at 89-91.

The peremptory challenge goes further than correcting errors rising to the level of abuse of discretion. It provides some opportunity for a party to catch those jurors who, in counsel's view, pose the greatest risk of unfairness, but who nonetheless have not demonstrated their biases in ways that would be widely recognized. An individual's bias can be

expressed in ways that are invisible on a paper record because they are revealed nonverbally. "To detect prejudices, the examiner . . . must elicit from prospective jurors candid answers about intimate details of their lives [and] must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Gomez*, 490 U.S. at 874-75; see Rebecca White Berch, *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 Fordham L. Rev. 347, 348 n.9, 360 n.67 (1990) (collecting sources stating that nonverbal sources make up at least 60% of communication, and up to 93% including spoken but nonlexical sounds); see also Judee K. Burgoon & Aaron E. Bacue, *Nonverbal Communication Skills, in Handbook of Communication and Social Interaction Skills* 179 (John O. Green, Brant R. Burleson eds., 2003); Albert Mehrabian, *Silent Messages: Implicit Communication of Emotions and Attitudes* 77 (2d ed. 1981).

And not all individuals will pick up such nonverbal cues, or interpret them to indicate the same thing about the prospective juror's state of mind. "That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous." *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring). "Voir dire provides a means of discovering actual *or implied* bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *Id.*, at 143-44 (emphasis added). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our

understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *Id.* at 148 (O'Connor, J., concurring).

The role of counsel's experienced judgment in helping to select a jury was recently highlighted by this Court as part of the reason that the wrongful denial of the right to counsel of choice is structural error. *Gonzalez-Lopez*, 548 U.S. at 150. This Court observed that "selection of the jury" and "questions asked on *voir dire*" are among the many important functions counsel serves during a trial. *Id.* at 150-51. And this Court has elsewhere observed the critical impact voir dire has on the jurors who ultimately sit in judgment of the defendant. "*Voir dire* permits a party to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial and may in some cases extend to sentencing as well." *Powers*, 499 U.S. at 413; see also *Gomez*, 490 U.S. at 875 (noting that "the atmosphere of the *voir dire* . . . may persist throughout the trial").

2. Both as a matter of unbroken historical practice, and practical impact, the peremptory challenge plays a critical role in the fairness of any jury trial in which they are used. That impact is dramatically highlighted when, as here, an attorney lawfuly announces his intention to use one of his peremptory challenges to strike a juror, but the court erroneously seats the juror anyway. Such an error violates due process.

After questioning Ms. Gomez about her work at a hospital known for treating large numbers of gunshot victims, counsel for petitioner announced in open court (as was required), in front of Ms. Gomez and other prospective jurors, his intention to strike Ms. Gomez. JA 33. He did so with the full expectation that the law demanded respect for his judgment

regarding Ms. Gomez. The prosecutor raised no objection to the challenge initially. Rather, the judge at that moment called all counsel and the defendant back to chambers. JA 33-34. After defense counsel was forced to express his reasons why he was concerned that Ms. Gomez might not fairly judge the case, JA 34, a concern which the Illinois Supreme Court considered reasonable and legitimate, JA 157, the prosecutor expressly asked to have Ms. Gomez "impaneled as a juror." JA 35. The trial court agreed and placed Ms. Gomez on the jury.

The potential for bias created by this process is substantial. To begin, petitioner lost the benefit of his trial counsel's judgment regarding Ms. Gomez's potential for bias. This is the precise fairness-advancing function the peremptory challenge is supposed to provide. *Supra* at 29-34. But beyond the bare fact that Ms. Gomez sat on the jury, she did so *after* learning that counsel for petitioner sought to have her removed. And the other jurors, who also observed petitioner's counsel seek to have Ms. Gomez removed, chose her as the foreperson. JA 44. This raises concerns about the impressions that the jurors formed of petitioner and his counsel in light of the incident. *Cf. Powers*, 499 U.S. at 413 (noting that the "relation" between a party and the jury established during voir dire "continues throughout the entire trial"). Finally, the prosecutor urged that Ms. Gomez be placed on the jury after all of this unfolded, and his request was granted. Peremptory challenges by the prosecution are as legitimate as peremptory challenges by the defense. But that is because "[t]he right to challenge is the right to reject, not to select a juror." *Hayes*, 120 U.S. at 71. Here, the State both judge and prosecutor selected a juror after the defendant expressed concerns about her fairness.

"[D]ue process imposes limitations on the composition of [the] jury." *Peters*, 407 U.S. at 501. "Illegal . . . jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." *Id.* at 502-03. For this reason, it does not matter that Ms. Gomez has not been shown to have been *actually* biased. The process used to select petitioner's jury created an intolerable risk of bias, thus exceeding the limits of due process.

In addition, the denial of petitioner's peremptory challenge shifted the balance of power over the composition of the jury decidedly to the State in petitioner's case. "[A] shift in the balance of peremptory challenges favoring the prosecution over the defendant can raise due process concerns." *United States* v. *Harbin*, 250 F.3d 532, 541 (7th Cir. 2001). No state allows the prosecution more peremptory challenges than the defendant, and many give the defendant more, especially in capital and felony cases. See Rottman & Strickland, *State Court Organization* 228-31, tbl.41 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf (listing eight states as giving the defendant more peremptory challenges in capital cases, seven in felony cases, and two in misdemeanor cases). Even more obviously, no state permits the prosecution the right to trump the defendant's exercise of one of its peremptory challenges. The substantial shift in power over peremptory challenges that occurred here, with the State vetoing one of petitioner's challenges while petitioner had no similar ability to veto any of the State's challenges, violated due process. *Cf. Wardius* v. *Oregon*, 412 U.S. 470 (1973) (state requirement that defendant provide notice-of-alibi on pain of

exclusion of alibi evidence at trial requires, as a matter of due process, a reciprocal discovery obligation be imposed on the prosecution).

Further, long-established Illinois law, and the essentially unbroken tradition of peremptory challenges stemming from its English common law roots and throughout our nation's history, created a protectable interest in the expectation that petitioner's lawful challenge of Ms. Gomez would be respected. See *Bd. of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). "[I]t would require a remarkable reading of [the Due Process Clause] to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right" to participate in the selection of a jury that is fair and impartial is not a protected liberty interest. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982); *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (state procedural right to be sentenced in the first instance by the jury creates a "substantial and legitimate expectation" the denial of which violates due process). That is especially so given that this Court has repeatedly stated that peremptory challenges are a state created means to the constitutional end of an impartial jury. *Supra* at 30-31 (citing cases). The trial court's arbitrary ruling deprived petitioner of his protectable interest in the effective use of his peremptory challenge, thus violating due process. *Hicks*, 447 U.S. at 346.

The constitutional significance of the error here thus does not depend on the existence of a free-standing constitutional right to peremptory challenges. This Court has repeatedly emphasized that peremptory challenges are creatures of state law and not a matter of constitutional compulsion. *Martinez-Salazar*, 528 U.S. at 307 ("'peremptory challenges [to prospective jurors] are not of constitutional dimension'") (quoting *Ross*, 487 U.S. at 88). This Court need not alter that rule to hold that the denial of this state-crated right in this way violated due process.

There is no constitutional right to a direct criminal appeal. *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Yet if a state chooses to provide a defendant as a matter of state law with a right to a direct criminal appeal, it must do so consistent with the standards of due process. *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). That standard requires the state to take steps necessary to ensure that the appeal is no "meaningless ritual," which includes both providing an indigent defendant with an attorney, *Douglas* v. *California*, 372 U.S. 353, 358 (1963), and ensuring that the attorney does not render ineffective assistance, *Evitts*, 469 U.S. at 396. In short, while the state need not establish a right to an appeal to challenge the lawfulness of a conviction, once it does, the Due Process Clause precludes it from administering the right in a way that defeats its purpose; a defendant cannot be denied "a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts*, 469 U.S. at 405; see *Hicks*, 447 U.S. at 345-46.

The same principle of due process applies here. The state need not provide criminal defendants with peremptory challenges. But once it does, the Due

Process Clause precludes the state from administering that right in a way that defeats its purpose; a defendant cannot be denied a fair opportunity to use his peremptory challenges to exclude jurors the defendant believes will be unfair.

The state thus violated due process here. That violation affected the composition of the jury. The error was structural; reversal of the conviction should be automatic.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

ROBERT N. HOCHMAN
AARON S. MANDEL
JEREMY G. MALLORY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JAMES K. LEVEN*
203 North LaSalle
Suite 2100
Chicago, IL 60601
(312) 558-1638

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

December 5, 2008

RESPONDENT'S BRIEF

No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA,

PETITIONER,

v.

ILLINOIS,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT

ANITA ALVAREZ
Cook County State's Attorney
JAMES E. FITZGERALD
ALAN J. SPELLBERG
JUDY L. DEANGELIS
Assistant State's Attorneys
309 Richard J. Daley Ctr.
50 W. Washington Street
Chicago, Illinois 60602
(312) 603-5496

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
MICHAEL M. GLICK
KARL R. TRIEBEL
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record

Counsel for Respondent

QUESTION PRESENTED

Whether a state trial court's good faith error in denying a criminal defendant's peremptory challenge requires reversal of a subsequent conviction as a matter of federal law, when that error did not deprive the defendant of a fair trial by an impartial jury or otherwise violate any federally protected right.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. Petitioner Has Not Suffered The Loss Of Any Federal Right, And Therefore Nothing In Federal Law Requires A New Trial 9

II. There Is No Constitutional Entitlement To The Flawless Application Of State Law 16

A. Federal Law Limits On The Federal Judicial Power Are Inapposite 17

B. Petitioner's Remaining Authorities Require Violations Of Specific, Constitutional Rights 21

C. Petitioner's Proposed Rule Would Require A New Trial For The Misapplication Of Countless State Procedural Rules 25

TABLE OF CONTENTS—Continued

III. The Denial Of Petitioner's Peremptory Challenge Did Not Violate Any Due Process Right 28

A. The Due Process Clause Does Not "Constitutionalize" All State Law Rules Capable Of Affecting The Composition Of State Juries 29

B. Neither The Undefined Risk Of Bias In Jurors Not Subject To Removal For Cause, Nor The Specific Facts Of This Case, Require The Recognition Of A New Due Process Right 30

1. There Is No Due Process Right To Peremptories On The Ground That They Reduce The Risk Or Appearance Of Juror Bias 31

2. No Risk Of Bias In This Case Warrants The Recognition Of A Novel Due Process Right 36

C. Property-Based Due Process Standards Do Not Apply To State Rules Of Criminal Procedure, But Petitioner Received All The Process He Was Due In Any Event 40

TABLE OF CONTENTS—Continued

IV. The Erroneous Denial Of A Peremptory Challenge Is Amenable To Harmless-Error Review 45

CONCLUSION 56

TABLE OF AUTHORITIES

Cases: **Page**

Am. Constr. Co. v. Jacksonville, T & K W. Ry. Co., 148 U.S. 372 (1893) 19, 29

Arizona v. Fulminante, 499 U.S. 279 (1991) 54

Ayshire Collieries Corp. v. United States, 331 U.S. 132 (1947) 18-19

Barclay v. Florida, 463 U.S. 939 (1983) 15

Batson v. Kentucky, 476 U.S. 79 (1986) 5, 12

Beck v. Washington, 369 U.S. 541 (1962) 25

Bd. of Regents v. Roth, 408 U.S. 564 (1972) 40

Brown v. North Carolina, 479 U.S. 940 (1986) 9

Busby v. Florida, 894 So.2d 88 (Fla. 2004) 48

Chandler v. Florida, 449 U.S. 560 (1981) 11

Conaway v. Polk, 453 F.3d 567 (4th Cir. 2006) ... 33

Cooper v. California, 386 U.S. 58 (1967) 15

Cumberland Tel. & Tel. Co. v. United States, 260 U.S. 212 (1922) 19

Daniels v. Williams, 474 U.S. 327 (1986) 42, 44

TABLE OF AUTHORITIES—Continued

Dennis v. United States, 339 U.S. 162 (1950) 10

Dickerson v. United States, 530 U.S. 428 (2000) .. 23

Douglas v. California, 372 U.S. 352 (1963) ... 44, 45

Dowling v. United States, 493 U.S. 342 (1990) ... 41

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 12, 23

Escoe v. Zerbst, 295 U.S. 490 (1935) 42

Estelle v. McGuire, 502 U.S. 62 (1991) 40, 41

Evitts v. Lucey, 469 U.S. 387 (1985) 44, 45

Frazier v. United States,
335 U.S. 497 (1948) 11, 12, 47

Fuller v. Johnson, 158 F.3d 903 (5th Cir. 1998) .. 26

Fulton-Carroll Ctr. v. Indus. Council of N.W. Chicago, 628 N.E.2d 1121
(Ill. App. Ct. 1993) 20

Georgia v. McCollum, 505 U.S. 42 (1992) 10, 12

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 19

Glover v. United States, 531 U.S. 198 (2001) 16

TABLE OF AUTHORITIES—Continued

Gomez v. United States, 490 U.S. 858 (1989) .. 18, 29

Gray v. Mississippi, 481 U.S. 648 (1987) 10, 22

Hedgpeth v. Pulido, 129 S. Ct. 530 (2008) 45

Hernandez v. New York, 500 U.S. 352 (1991) 43

Hicks v. Oklahoma, 447 U.S. 343 (1980) 42

Holland v. Illinois, 493 U.S. 474 (1990) 31

Holloway v. Arkansas, 435 U.S. 475 (1978) 54

In re Estate of Howell,
867 N.E.2d 559 (Ill. App. Ct. 2007) 20

In re Murchison, 349 U.S. 133 (1955) 21, 31, 32

Irvin v. Dowd, 366 U.S. 717 (1961) 21, 49, 50

J.E.B. v. Alabama, 511 U.S. 127 (1994) 12

Klahn v. Wyoming, 96 P.3d 472 (Wyo. 2004) 48

Lewis v. Casey, 518 U.S. 343 (1996) 44

Lisenba v. California, 314 U.S. 219 (1941) 11

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 10

TABLE OF AUTHORITIES—Continued

Mathews v. Eldridge, 424 U.S. 319 (1976) 41

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 47, 48

Medina v. California, 505 U.S. 437 (1992) 41

Miller-El v. Dretke, 545 U.S. 231 (2005) 28, 35

Moran v. Dillingham, 174 U.S. 153 (1899) 19

Mu'Min v. Virginia, 500 U.S. 415 (1991) 11

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 33-34

Neder v. United States, 527 U.S. 1 (1999) ... *passim*

Nguyen v. United States, 539 U.S. 69 (2003) .. 18, 19

Offutt v. United States, 348 U.S. 11 (1954) 31, 32, 33

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, (474 U.S. 327 1986) 42

Patton v. Yount, 467 U.S. 1025 (1984) 10, 49

People v. Bell, 702 N.W.2d 128 (Mich. 2005) 15

People v. Nitz, 848 N.E.2d 982 (Ill. 2006) 6

TABLE OF AUTHORITIES—Continued

People v. Phillips, 831 N.E.2d 574 (Ill. 2005) 16

People v. Thurow, 786 N.E.2d 1019 (Ill. 2003) 6

People v. Williams,
827 P.2d 612 (Colo. Ct. App. 1992) 27

Peters v. Kiff, 407 U.S. 497 (1972) 24, 31, 32, 55

Pointer v. United States,
151 U.S. 396 (1894) 10, 11

Reynaga v. Cammisa,
971 F.2d 414 (9th Cir. 1992) 18

Rice v. Collins, 546 U.S. 333 (2006) 35

Riegel v. Medtronic, 128 S. Ct. 999 (2008) 16

Rose v. Mitchell, 443 U.S. 545 (1979) 21

Ross v. Oklahoma, 487 U.S. 81 (1988) ..... *passim*

Rushen v. Spain, 464 U.S. 114 (1983) 47, 48

Schneble v. Florida, 405 U.S. 427 (1972) 53

Sheppard v. Maxwell, 384 U.S. 333 (1966) 33

Smith v. Phillips, 455 U.S. 209 (1982) 33

Smith v. Robbins, 528 U.S. 259 (2000) 45

TABLE OF AUTHORITIES—Continued

State v. DiFrisco, 645 A.2d 734 (N.J. 1994) 48

State v. Hickman, 68 P.3d 418 (Ariz. 2003) 38

State v. Lindell,
629 N.W.2d 223 (Wis. 2001) 48, 49

State v. Neuendorf,
509 N.W.2d 743 (Iowa 1994) 48

Stilson v. United States,
250 U.S. 583 (1912) 12, 13, 15

Strickland v. Washington,
466 U.S. 668 (1984) 54, 55

Sullivan v. Louisiana, 508 U.S. 275 (1993) ... 49, 51

Sunal v. Large, 332 U.S. 174 (1947) 42

Swain v. Alabama, 380 U.S. 202 (1965) 12, 46

Thiel v. S. Pac. Co., 328 U.S. 217 (1946) 23

Tumey v. Ohio, 273 U.S. 510 (1927) ... 21, 31, 32, 33

Turner v. Louisiana, 379 U.S. 466 (1965) 32, 33

United States v. Am.-Foreign Steamship Corp.,
363 U.S. 685 (1960) 18

TABLE OF AUTHORITIES—Continued

United States v. Annigoni,
96 F.3d 1132 (9th Cir. 1996) 47, 50

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 46, 53, 54

United States v. Harbin,
250 F.3d 532 (7th Cir. 2001) 39

United States v. Hasting, 461 U.S. 499 (1983) 53

United States v. Johnson,
495 F.3d 951 (8th Cir. 2007) 14

United States v. Lane, 474 U.S. 438 (1986) ... 40, 41

United States v. Martinez-Salazar,
528 U.S. 304 (2000) ..... *passim*

United States v. Morrison, 449 U.S. 361 (1981) ... 47

United States v. Patterson, 215 F.3d 776 (7th Cir.),
vacated in part by Patterson v. United States,
531 U.S. 1033 (2000) 12, 26, 47

United States v. Polichemi,
219 F.3d 698 (7th Cir. 2000) 14, 33

Vasquez v. Hillery, 474 U.S. 254 (1986) ... 24, 25, 55

Virginia v. Moore, 128 S. Ct. 1598 (2008) 26, 27

TABLE OF AUTHORITIES—Continued

Wainwright v. Witt, 469 U.S. 412 (1985) 9

Wardius v. Oregon, 412 U.S. 470 (1973) 39

Washington v. Recuenco, 548 U.S. 212 (2006) 45

William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtiss Marine Turbine Co., 228 U.S. 645 (1913) 30, 54

Wingo v. Wedding, 418 U.S. 461 (1974) 18, 54

Witherspoon v. Illinois, 391 U.S. 510 (1968) 22

Young v. United States ex rel. Louis Vuitton et Fils S.A., 481 U.S. 787 (1987) 22, 23

Zinermon v. Burch, 494 U.S. 113 (1990) 42

Constitutions, Statutes, and Rules:

U.S. Const. amend. VI 9

U.S. Const. amend. XXVI, § 1 26

705 Ill. Comp. Stat. 305/2 (2006) 2, 20

705 Ill. Comp. Stat. 305/2(1) (2006) 27

725 Ill. Comp. Stat. 5/115-4(f) (2006) 1

Ark. Code Ann. § 16-31-102(a)(4) (2008) 27

TABLE OF AUTHORITIES—Continued

Colo. Rev. Stat. § 13-71-105(1) (2008) 27

Colo. Rev. Stat. § 13-71-105(2)(f) (2008) 27

Colo. Rev. Stat. § 13-71-105(3) (2008) 27

Conn. Gen. Stat. § 51-217(a)(7) (2008) 26, 27

Miss. Code Ann. § 13-15-1 (2008) 26

Mo. Rev. Stat. § 494.425 (2008) 26

Neb. Rev. Stat. § 25-1601 (2008) 26

Ill. Sup. Ct. R. 341(h)(7) 16

Ill. Sup. Ct. R. 431 1

Ill. Sup. Ct. R. 434(a) 1

Ill. Sup. Ct. R. 434(d) 1, 14

Cook Cty. Gen. Ord. 1.2 20

Cir. Ct. Cook Cty. R. 0.4(c) 27

Miscellaneous:

4 William Blackstone, *Commentaries* 34, 35

TABLE OF AUTHORITIES—Continued

Major Robert Wm. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, 183 Mil. L. Rev. 1 (2005) 35

William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391 (2001) 34, 35

STATEMENT

On January 10, 1998, 16-year-old Marcus Lee was shot and killed. JA 100-101. Five members of the Insane Deuces street gang were arrested and charged with Lee's murder, including petitioner Michael Rivera, the gang's "chief enforcer" and the alleged shooter. JA 64. Petitioner was prosecuted on evidence that, without provocation, he shot Lee in the back of the head because he mistakenly believed that Lee was a member of a rival gang. JA 64, 100. The evidence further showed that petitioner bragged to fellow gang members about the killing. JA 64.

Pursuant to Illinois law, see Ill. Sup. Ct. R. 434(a), the twelve-person jury was seated in three, four-person panels, Vol. I at A84, A155, A227. As state law requires, see 725 Ill. Comp. Stat. 5/115-4(f) (2006); Ill. Sup. Ct. R. 431, the trial court questioned each prospective juror individually and, after identifying four legally qualified jurors, passed the panel to counsel for further questioning and to exercise any peremptory challenges, *e.g.*, Vol. I at A24-A66, A85-A107, A168-A204. Each side was allowed seven peremptory challenges, Vol. I at A4, which is the proper allocation under Illinois law, see Ill. Sup. Ct. R. 434(d).

In selecting the first panel, the trial court, without objection, excused four prospective jurors—three men and one woman—for cause. Vol. I at A33, A43-A44, A19, A58. The court then allowed defense counsel to exercise a peremptory challenge against an African-American woman. Vol. I at A73, A110. The prosecution declined to use any peremptories, and the court seated the first four jurors, Vol. I at A84, all of whom were women.

For the second panel, the trial court excused five prospective jurors for cause. Vol. I at A102, A120, A142, A147, A159. The defense objected to one of these dismissals, but the trial court excused her anyway because she understood little English, A145, A147, which disqualified her under Illinois law, see 705 Ill. Comp. Stat. 305/2 (2006). When the prosecution exercised its first peremptory challenge, against a woman, Vol. I at A109, defense counsel noted that both the challenged juror and petitioner were Hispanic; he also acknowledged that he had used his first peremptory against a prospective juror who, like the victim, was African-American, Vol. I at A109-A110. Defense counsel then exercised his second and third peremptories, removing a woman and a man, Vol. I at A128, A138, and the court seated the second panel, Vol. I at A155, A167, three women and one man.

The trial court began its selection of the third panel by examining prospective juror Deloris Gomez. Vol. I at A168. When questioned by the court, Gomez stated that she was a business office supervisor at Cook County Hospital. JA 29. She indicated that there was nothing that would affect her impartiality, and she had no doubt that she could be fair if selected. JA 29-32. After excusing three men for cause—all on the defense's request—the trial court tendered the third panel, including Gomez, to counsel for additional questioning. Vol. I at A185, A189, A193, A204.

Defense counsel questioned Gomez and two of the three remaining potential jurors. Vol. I at A207-A210. In response to counsel's inquiries, Gomez explained that she was a clerical supervisor at the hospital's orthopedic clinic, an out-patient facility located in a

separate building from the hospital. JA 32-33. Although she had some contact with the clinic's patients "[a]s far as checking them in," this would not bias her against petitioner. JA 32. After this brief questioning, defense counsel sought to exercise his fourth peremptory challenge against Gomez. He informed the court that, "with thanks, we would ask to excuse Mrs. Gomez." JA 33.

Outside the presence of the prospective jurors, the court indicated its concern that defense counsel had discriminated against Gomez who, the court observed, "appears to be an African American female." JA 34. Citing its obligation to protect "the citizen's right to sit as a juror," the court asked defense counsel to provide a basis for the challenge. *Ibid.* Counsel said he was "pulled in two different ways" by Gomez. *Ibid.* He "kn[e]w she has some kind of Hispanic connection given her name" but was concerned that she "on a daily basis sees those victims who are victims of violent crimes." *Ibid.* Counsel also acknowledged that he had accepted only one of the three African-American women tendered thus far. JA 35. The prosecution urged that Gomez be seated. JA 34-35.

The court overruled the peremptory challenge. JA 36. Not only was Gomez the second African-American woman defense counsel had sought to remove without cause, but his proffered basis was inadequate: Cook County Hospital may have a reputation for treating gunshot victims, but Gomez worked in the business office of a clinical division, not the emergency room. JA 35.

The court already had decided to seat Gomez, but defense counsel sought and received permission to

question her further, out of the other jurors' presence. JA 36. In response to additional questions, Gomez again explained that she did not work in the emergency room but in a separate building. JA 37. Although she sometimes saw gunshot victims when they came to pick up a prescription or for other non-emergency treatment, she was certain that she would have no bias against petitioner. JA 36-38.

Defense counsel renewed his request to strike Gomez, again out of her presence:

> My feeling [sic] are still the same. I feel that I'm trying to modify the composition of this panel. I'm not trying to * * * excuse a juror because of her race. But also I think I can also factor in the fact that she would now be out of the—by the fact that the jury is predominantly women. I'm trying to also get some impact from possibly other men in the case.

JA 39. Counsel then cited the "disturbing" nature of Gomez's employment. JA 40. The court again declined to remove Gomez, explaining that it had "considered her statements very carefully," found her to be "a very intelligent lady," and identified "no basis for cause." *Ibid.* The court permitted defense counsel to re-exercise its fourth peremptory challenge against a different juror via "back-strike," contrary to usual practice. JA 40-41, 139-140. The court then seated the third panel, Vol. I at A227, two men and two women. Without challenge, the court seated three men as alternate jurors. Vol. I at A245-A246.

After a three-day trial, the jury, with Gomez as foreperson, JA 44, found petitioner guilty of first-

degree murder, JA 103. After determining that the maximum sentence was justified and an extended term was warranted, the court sentenced defendant to 85 years in the Illinois Department of Corrections. JA 104.

On appeal, petitioner did not challenge the sufficiency of the evidence supporting his conviction, JA 63, 100, but in relevant part argued that the trial court committed reversible error when it failed to honor his peremptory challenge and seated Gomez, JA 64-66. The Illinois Appellate Court affirmed, agreeing with the trial court that defense counsel's proffered basis was inadequate, both because Gomez worked in a business office separate and apart from the emergency room and because "defense counsel admitted that he was striking Gomez because she was a woman, * * * describ[ing] this clear act of gender discrimination as an attempt to 'balance' the jury." JA 78-79. On further review, the Illinois Supreme Court remanded "for a limited hearing to allow the trial judge an opportunity to articulate the bases for his *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] rulings." JA 132.

On remand, the trial court explained that it found petitioner to have been motivated by gender discrimination. JA 136. The court noted that Gomez was the third woman that defense counsel had challenged peremptorily, and that counsel sought to remove her despite her testimony that she could be impartial. JA 135-136. Moreover, in lieu of a neutral explanation, counsel admitted that he sought to excuse Gomez because she was a woman—to obtain "input" from male jurors and more evenly "balance" the jury. JA 136.

On this record, the Illinois Supreme Court held that, at the time the trial court asked defense counsel to explain his peremptory challenge, the evidence did not support a *prima facie* case of discrimination. JA 157-158. Accordingly—putting aside counsel's admission that he had engaged in gender discrimination—the court held that Gomez should have been seated. *Ibid.* The court declined to find the trial court's error "structural," however, because there was "no evidence that [petitioner] was tried before a biased jury, or even *one* biased juror," nor was there even an argument "that Gomez was subject to excusal for cause." JA 164. Following this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), as well as its own decisions in *People v. Thurow*, 786 N.E.2d 1019 (Ill. 2003), and *People v. Nitz*, 848 N.E.2d 982 (Ill. 2006), the court applied harmless-error review to uphold petitioner's conviction, concluding that the evidence was so "overwhelming[ly]" adverse to petitioner that "any rational trier of fact would have found [him] guilty." JA 171. As a result, "Gomez's presence on the jury cannot be said to have prejudiced him," JA 166, and the erroneous denial of the peremptory challenge was "harmless beyond a reasonable doubt," JA 171. Because any federal constitutional error was harmless, the court had no occasion to decide the threshold question "whether the erroneous denial of a peremptory challenge is" even "an error of constitutional dimension." *Ibid.*

This Court granted certiorari on October 1, 2008.

SUMMARY OF ARGUMENT

Petitioner received a fundamentally fair trial before an impartial jury. That is all that the Constitution requires. His complaint is that trial court error deprived him of a peremptory challenge to which he was entitled under Illinois law, but such a state law deprivation is subject to Illinois' own harmless-error rules. Simply put, federal law does not determine the effect of any error in this case.

Petitioner seeks some federal footing for his claim, first by asserting that this Court routinely overturns judgments by "improperly constituted" tribunals, then by urging that the trial court's failure to honor one of his peremptories violated due process. Both theories fail. With the first, petitioner suggests a rule whereby federal courts must overturn state judgments for state law errors in the composition of state tribunals. But no such rule exists, and none of petitioner's authority implies one. It is for Illinois law to determine which "errors" in the composition of its tribunals are so profound that they render any resulting judgments void.

Petitioner's secondary argument—that the court's refusal to remove Gomez from the venire violated due process—likewise fails. It is a bedrock principle that parties have no constitutional right to peremptory challenges. And even if that were not settled law, petitioner's due process theories are meritless. Petitioner contends that uninhibited use of state-law peremptories is required to combat the "appearance" or "risk" of bias, either generally or specifically in this case, but the Constitution only prohibits actual bias, and there is no claim of such bias here (for petitioner

has never alleged that Gomez was subject to removal for cause), nor is there evidence to support such a claim. And to the extent that petitioner raises a distinct, procedural due process claim based on an entitlement to peremptories under Illinois law, he received robust pre- and post-deprivation process and thus cannot allege arbitrary treatment. His complaint is that a trial court's good faith error produced the wrong result, but such error does not violate procedural due process.

Petitioner's remaining point is that the erroneous denial of a peremptory challenge is not amenable to harmless-error analysis, but this claim fails on multiple grounds. Even if petitioner had suffered the violation of a constitutional right (and he did not), harmless-error review would apply. The loss of a peremptory challenge does not implicate the fundamental interests for which structural error is reserved, and courts can readily review such errors for harmlessness. Appellate courts routinely assess juror impartiality, a task made especially easy where, as here, there is no claim of actual juror bias. Alternatively, courts are well-equipped to address harmlessness in terms of the overall evidentiary record, without any intrusion on Sixth Amendment rights.

Accordingly, the judgment below must be affirmed.

ARGUMENT

I. Petitioner Has Not Suffered The Loss Of Any Federal Right, And Therefore Nothing In Federal Law Requires A New Trial.

Because the Illinois Supreme Court properly held that any constitutional error would have been harmless in this case, the court had no occasion to "decide whether the erroneous denial of a peremptory challenge is" even "an error of constitutional dimension in these circumstances." JA 171. In fact, petitioner did not suffer any constitutional violation, and this alone defeats his claim that federal law entitles him to a new trial. Even if the state trial court purportedly erred by misapplying *Batson*, no one's *Batson* rights were violated. Rather, petitioner seeks to vindicate the deprivation of his state law right to exercise a peremptory challenge, and Illinois law determines the effect of that error. In concluding that it need not decide whether there was constitutional error at all to resolve the appeal, the Illinois Supreme Court implicitly but squarely held that state law does not require a new trial for the deprivation of a peremptory strike. Accordingly, for this reason alone the judgment below must be affirmed.

Criminal defendants are constitutionally entitled to trial before "an impartial jury." U.S. Const. amend. VI, and any juror with views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" is subject to removal for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotations omitted); see also *Brown v. North Carolina*, 479 U.S. 940, 941 (1986) (O'Connor, J., concurring in denial of

pet. for cert.) ("Challenges for cause permit the categorical and unlimited exclusion of jurors exhibiting an inability to serve fairly and impartially in the case to be tried"); see generally *Gray v. Mississippi*, 481 U.S. 648, 652 n.3 (1987) ("There is no limitation on the number of venire members who may be challenged for cause."). And just as the seating of a juror who should have been removed for cause violates the Sixth Amendment right to impartiality, see, *e.g.*, *Dennis v. United States*, 339 U.S. 162, 171-172 (1950), the converse is also true; jurors who are not subject to challenge for cause are considered to be impartial, see, *e.g.*, *Patton v. Yount*, 467 U.S. 1025, 1036-1040 & n.12 (1984) (impartial juror—one who "can lay aside his opinion and render a verdict based on the evidence"—is qualified for constitutional purposes and need not be dismissed for cause); *Pointer v. United States*, 151 U.S. 396, 412 (1894) (describing list of jurors, who had survived for cause challenges but remained subject to peremptory challenges, as "the list of impartial jurymen"). Petitioner has never claimed a right to remove Gomez for cause, nor could he, and petitioner was therefore tried and convicted by a constitutionally impartial jury.

It is not disputed that peremptory challenges may serve as an additional weapon against potential juror bias. See *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (peremptory challenges "are one means to achieve the constitutionally required end of an impartial jury," but "are not of constitutional dimension") (internal quotations omitted); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (peremptories "are but one state created means to the constitutional end of an impartial jury and a fair trial"). And this is

especially true when these challenges are used to remove jurors whom the trial court erroneously failed to remove for cause, a traditional if not primary purpose of the peremptory. See, *e.g.*, *Martinez-Salazar*, 528 U.S. at 316 (using peremptory challenge to remove juror who should have been removed for cause was "in line with a principle reason for peremptories: to help secure the constitutional guarantee of an impartial jury"); *id.* at 319 (Scalia, *J.*, concurring in judgment) ("it may well be * * * one of the very purposes of peremptory challenges to enable the defendant to correct judicial error" in failing to remove a juror for cause).

But there are many tools to protect against juror bias, see, *e.g.*, *Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("courts have developed a range of curative devices" to combat juror bias attributable to media coverage), and rooting out bias is not the sole purpose of peremptory challenges. A party may exercise them "without reason or for no reason, arbitrarily and capriciously," *Pointer*, 151 U.S. at 408, and their "purpose" is therefore far broader: "to afford [a party] an opportunity beyond the minimum requirements of fair selection to express an arbitrary preference among jurors properly selected and fully qualified to sit in judgment on his case." *Frazier v. United States*, 335 U.S. 497, 506 (1948); see also *Mu'Min v. Virginia*, 500 U.S. 415, 424-435 (1991) (although parties may use peremptories to remove jurors based on their "general outlook on life," neither peremptories nor this "benefit" is constitutionally mandated). A party may deploy these challenges to remove venire members whom he fears are not predisposed in his favor, to accommodate a lawyer's unfounded suppositions, or—if petitioner

prevails here and every good faith but erroneous finding of unlawful discrimination in jury selection automatically results in a new trial—strategically on jurors (like Gomez) who may trigger *Batson* rulings that can later be used to force an automatic reversal. See generally *United States v. Patterson*, 215 F.3d 776, 779 (7th Cir.) (parties may use peremptories to "eliminat[e] unbiased jurors who a party believes may (perhaps *because* of their open minds) favor the other side"), *vacated in part by Patterson v. United States*, 531 U.S. 1033 (2000).

Accordingly, "unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges" simply "are not of federal constitutional dimension." *Martinez-Salazar*, 528 U.S. at 311. This Court has reaffirmed that bedrock principle time and again. See, *e.g.*, *id.* at 307; *J.E.B. v. Alabama*, 511 U.S. 127, 137 n.7 (1994); *McCollum*, 505 U.S. at 57; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Batson*, 476 U.S. at 91, 98; *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Frazier*, 335 U.S. at 505 n.1; *Stilson v. United States*, 250 U.S. 583, 586 (1912). Simply put, "[t]he [peremptory] right is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of 'an impartial jury' and a fair trial." *Frazier*, 335 U.S. at 506 n.11.

Accordingly, "[t]his Court has sanctioned numerous incursions upon the right to challenge peremptorily," *Ross*, 487 U.S. at 90 (internal quotations omitted), including "limitations that could be viewed as effectively reducing the number of challenges available to a defendant." *Martinez-Salazar*, 528 U.S. at 314

(citing cases); see, *e.g.*, *Stilson*, 250 U.S. at 586-587 (upholding rule requiring co-defendants to share allotment of peremptory challenges). And the Court has specifically "rejected * * * the position that, without more, 'the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury.'" *Martinez-Salazar*, 528 U.S. at 313 (quoting *Ross*, 487 U.S. at 88). This is so even if the erroneous deprivation of the challenge likely changed the jury's composition, for the Court has also squarely rejected the corollary "that any error which affects the composition of the jury must result in reversal." *Ross*, 487 U.S. at 87 n.2; see also *id.* at 87 (although jury may have been different absent trial court's error, declining to "accept the argument that this possibility mandates reversal").

There was thus no constitutional violation in *Ross* in the fact that the defendant devoted one of his peremptories to remove a juror whom the trial court should have removed for cause, although the defendant went on to exhaust all of his peremptory challenges. The Court emphasized that the defendant had no constitutional entitlement to his peremptory challenges to begin with, see *Ross*, 487 U.S. at 88-89; see also *Martinez-Salazar*, 528 U.S. at 311, that error causing the deprivation of a peremptory is not a constitutional violation, see *Ross*, 487 U.S. at 88, and that the jurors who actually sat were not subject to challenge for cause, see *id.* at 86 ("None of [the] 12 jurors * * * was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial."); see also *Martinez-Salazar*, 528 U.S. at 316 ("Nor did the District Court's ruling result in the seating of any juror who should have been dismissed

for cause."). It was immaterial that the defendant might have used an additional peremptory to challenge another member of the venire. See *Ross*, 487 U.S. at 87 ("Petitioner points out that had he not used his sixth peremptory challenge to remove Huling, he could have removed another juror, including one who ultimately sat on the jury."). There, as here, the loss of a peremptory challenge simply did not offend the defendant's constitutional rights.

Petitioner may contend that *Ross* is different, because here petitioner has identified the specific juror (Gomez) whom he would have removed. But this is not the fact on which the Court's holding in *Ross* turned, nor could it be. The Court acknowledged that the trial court's error "may have resulted in a jury panel different from that which would otherwise have decided the case," *ibid.*, and *Ross* would be a dead letter if all that were required to avoid its rule would be to identify some juror against whom the party would have used its lost peremptory. See *United States v. Polichemi*, 219 F.3d 698, 705 (7th Cir. 2000) (rejecting claim that *Martinez-Salazar* was distinguishable because Polichemi sought additional peremptories after using one to cure an erroneous, for cause denial, and defendant objected to jury as constituted"); *United States v. Johnson*, 495 F.3d 951, 965 (8th Cir. 2007) (same, even though defendant used several peremptories to correct court's alleged for cause errors). In short, petitioner was tried before an impartial jury, and the court's failure to honor one of the seven peremptory challenges that Illinois law provides, see Ill. Sup. Ct. Rule 434(d), did not violate any constitutional right.

States always retain the "power to impose higher standards * * * than required by the Federal Constitution," "[a]nd when such state standards alone have been violated the State is free, without review by [this Court], to apply its own state harmless-error rule to such errors of state law." *Cooper v. California*, 386 U.S. 58, 62 (1967); see also *ibid.* (without "federal constitutional error," there is "no need * * * to determine whether the lower court properly applied its state harmless-error rule"); *Barclay v. Florida*, 463 U.S. 939, 951 n.8, 957-958 (1983) (plurality op.) (where State granted extra-constitutional protections at capital sentencing, violation of state protection did not trigger "federal harmless error analysis," and Florida Supreme Court therefore applied its own harmless-error standard). Thus, in *People v. Bell*, 702 N.W.2d 128, 138-139 (Mich. 2005), the Michigan Supreme Court recognized that, unlike a *Batson* violation, a misapplication of *Baston* resulting in the loss of a peremptory challenge deprived the party of a state law right, and choosing the applicable standard of review accordingly involved a pure question of Michigan law. In short, "[t]he privilege" of having peremptory challenges "must be taken with the limitations placed upon the manner of its exercise," *Stilson*, 250 U.S. at 587, and Illinois law does not require automatic reversal of petitioner's verdict.

Petitioner's jury was impartial, and unlike Illinois law, the Constitution provides no supplemental right to peremptory challenges. Accordingly, any interference with that right is at best a violation of state law, subject to state harmless-error rules, and Illinois law does not entitle petitioner to a new trial.

The judgment of the Illinois Supreme Court therefore must be affirmed.

II. There Is No Constitutional Entitlement To The Flawless Application Of State Law.

Although petitioner originally argued that before there can be federal, structural error, there first must be a federal *constitutional* violation, Reply in Support of Pet. 5, he now disavows that principle and asserts for the first time that he is entitled to a new trial without establishing any constitutional deprivation. His theory is that trial before any "defectively" or "improperly constituted" tribunal (Pet. Br. 12, 13)—even one that satisfies federal constitutional standards, so long as it is defective in some way under state law—requires a new trial as a matter of federal law. Having failed to advance this theory in the Illinois Supreme Court, and having implicitly rejected it in support of his petition, petitioner cannot properly raise this claim for the first time now. Under Illinois law, an appellant's failure to raise an argument results in waiver. See Ill. Sup. Ct. R. 341(h)(7); *People v. Phillips*, 831 N.E.2d 574, 581 (Ill. 2005). And petitioner's waiver of this argument in state court bars him from pressing it here. See *Riegel v. Medtronic*, 128 S. Ct. 999, 1011 (2008) (declining to address in first instance claim not briefed before court below nor raised in certiorari petition); see also *Glover v. United States*, 531 U.S. 198, 205 (2001).

Should the Court choose to address this theory in the first instance, it nevertheless fails on its merits, for petitioner nowhere identifies the federal law that requires his proposed result (though he admits that it is not of constitutional dimension). Pet. Br. 13, 18 n.3.

And critically petitioner's "rule" is impossible to square with this Court's express rejection of the claim "that any error which affects the composition of the jury must result in reversal." *Ross*, 487 U.S. at 87 & n.2.

In fact, petitioner merely cobbles together disparate lines of authority vacating judgments on a number of distinct grounds, none of which would even be necessary if there were an overarching rule requiring reversal whenever a tribunal is defectively composed. Moreover, none of the federal doctrines at work in petitioner's cases has any application here: they involve either (1) a violation of congressional limits on federal judicial power, producing judgments that are *ultra vires* and void as a matter of established federal law; or (2) federal constitutional violations resulting in an unconstitutionally biased adjudicator (not an issue here, see *supra* Part I), or the need to deter intentional race discrimination in jury selection (also not at issue here—indeed, if the state trial court erroneously deprived petitioner of a peremptory challenge, it was in an effort to protect jurors from unlawful bias).

A. Federal Law Limits On The Federal Judicial Power Are Inapposite.

Petitioner relies on several decisions involving tribunals' *ultra vires*, extra-jurisdictional acts. In these cases, federal courts acted beyond their lawful authority, and reviewing courts determined as a matter of federal law that the resulting decisions were therefore void—legal non-events by unofficial tribunals. Petitioner offers no authority for the distinct legal proposition, which he implicitly asks this Court to recognize, that federal law operates to void any state judgment by a tribunal whose composition

departs in some manner from what state law requires—even where, as here, state law itself does not recognize that departure as grounds for voiding the judgment.

Two of petitioner's cases involved *ultra vires* acts by federal magistrate judges who exceeded their statutory authority. In *Gomez v. United States*, 490 U.S. 858 (1989), the magistrate unlawfully presided over part of a federal felony proceeding. See *id.* at 875-876. And in *Wingo v. Wedding*, 418 U.S. 461 (1974), the magistrate violated an express congressional directive by conducting an evidentiary hearing on federal habeas corpus review. See *id.* at 472-474. The federal question in these cases was whether Congress had authorized the conduct in question, for without statutory authority the magistrate lacked the very "jurisdiction needed to preside." *Gomez*, 490 U.S. at 876. These were federal determinations about the lawful scope of a magistrate's power, and the court concluded in each that, as a matter of federal law, acts in excess of that scope are legally void. See, *e.g.*, *Reynaga v. Cammisa*, 971 F.2d 414, 417 (9th Cir. 1992) (act by magistrate outside his statutory authority is "beyond his jurisdiction and * * *, in essence, a legal nullity").

Petitioner's remaining authorities involved congressional limits on the lawful power of Article III appellate courts, and are therefore similarly inapposite. See *Nguyen v. United States*, 539 U.S. 69, 79-80 (2003) (violation of federal law for non-Article III judge to sit on appellate panel); *United States v. Am. Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960) (violation of judicial code provision limiting *en banc* participation to active judges); *Ayrshire Collieries Corp.*

v. United States, 331 U.S. 132, 135 (1947) (violation of federal statute to have only two judges sit on panel, which rendered judgment "void"); *Moran v. Dillingham*, 174 U.S. 153, 157-158 (1899) (violation of federal law "disqualified" judge who presided over trial court from sitting as member of appellate panel in same case).

In turn, each of these decisions (with the exception of *Ayrshire Collieries*) relied expressly on *Am. Constr. Co. v. Jacksonville, T & K W. Ry. Co.*, 148 U.S. 372 (1893), which held that any decision by a tribunal unauthorized by the Federal Judiciary Act is void *ab initio* as an act outside the court's lawful jurisdiction and is thus likely a legal non-event. See *id.* at 387 ("If the statute made [a judge] incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void"); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (characterizing rule in *American Construction* as "jurisdictional"). For its part, the Court in *Ayrshire Collieries* relied on *Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n*, 260 U.S. 212 (1922), which likewise made clear that the statutory requirement that three judges sit on an appeal was a matter of federal "statutory power and jurisdiction," the breach of which rendered any resulting judgment "void and * * * without jurisdiction." *Id.* at 217, 219. And the *Nguyen* Court similarly recognized that placing a non-Article III judge on a federal appellate panel violated a "fundamental" limit on "judicial authority," namely "Congress' decision to preserve the Article III character of the courts of appeals." 539 U.S. at 79-80. Even by agreement, the parties could not authorize "the

participation of a non-Article III judge in the consideration of their appeals." *Id.* at 80-81.

None of these decisions has any bearing here. Each identifies jurisdictional limits on federal magistrates or appellate courts and refuses to give legal effect to *ultra vires* judicial acts as a matter of federal law. The Court in these cases did not purport to make a federal question of what is extra-jurisdictional for state courts constituted under state law, much less what the remedy is for an extra-jurisdictional act by a state tribunal. These are questions of state law, and Illinois law does not require a new trial here.[1] See *supra* p. 9, 15. Indeed, Gomez was "qualified" under Illinois law, which spells out juror qualifications in terms of factors such as character, integrity, judgment, residency, age, English literacy, and U.S. citizenship. See 705 Ill. Comp. Stat. 305/2 (2006). Petitioner has never argued that Gomez failed to satisfy any of these criteria. And notwithstanding the failure to honor one of petitioner's peremptory challenges, Illinois law does not treat his jury as an *ultra vires* tribunal whose acts are without legal effect. Indeed, such a rule of state law would

---

[1] As another example of state law determining whether judgments by "improperly constituted" tribunals are void, Illinois law does not require courts to overturn or disregard judgments rendered by the improper department, division, or section of the Circuit Court of Cook County. See Cook Cty. Gen. Ord. 1.2; *Fulton-Carroll Ctr. v. Indus. Council of N.W. Chicago*, 628 N.E.2d 1121, 1123 (Ill. App. Ct. 1993); *In re Estate of Howell*, 867 N.E.2d 559, 561-562 (Ill. App. Ct. 2007). Petitioner's proposed federal rule would disregard this determination by the Illinois courts and require reversal.

have required the state supreme court to vacate petitioner's conviction regardless of any federal harmless-error analysis.

B. Petitioner's Remaining Authorities Require Violations Of Specific, Constitutional Rights.

The remaining authorities for petitioner's "rule"—that all decisions arising from an improperly constituted tribunal must be reversed as a matter of non-constitutional, federal law—involve actual violations of federal constitutional rights.

First, petitioner relies on a series of decisions involving an unconstitutionally biased judge or jury. In two, the judge had a direct personal interest in the case. See *Tumey v. Ohio*, 273 U.S. 510, 520, 530 (1927) (mayor presiding over criminal court would receive payments if he convicted defendants, but not if he acquitted, giving the adjudicator "a direct, personal, substantial pecuniary interest" in the outcome); *In re Murchison*, 349 U.S. 133, 134-135 (1955) (judge served as "'one-man judge-grand jury'" in closed-door proceedings and charged parties with criminal contempt based on those proceedings, then also served as required, "impartial tribunal" before whom the parties were tried for contempt). And in *Irvin v. Dowd*, 366 U.S. 717 (1961), this Court overturned the conviction of a capital defendant tried by an unconstitutionally biased jury. Eight of his twelve jurors indicated at voir dire that they already "had an opinion that petitioner was guilty and were familiar with the material facts and circumstances" of the case. *Id.* at 728.

Likewise, in *Gray*, the capital sentencing jury was unconstitutionally biased because the trial court excluded a juror for cause in violation of the Sixth and Fourteenth Amendment prohibition on "the exclusion of venire members 'simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" 481 U.S. at 657 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)). The error in *Gray* thus deprived defendant of his right to an impartial jury at sentencing, and this Court has since emphasized that *Gray*'s holding is limited to that context: "the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case." *Ross*, 487 U.S. at 87; see also *id.* at 87 n.2 ("As the dissent in *Gray* pointed out, the statement that any error which affects the composition of the jury must result in reversal defies literal application.").

These decisions, and the principle that defendants subjected to an unconstitutionally biased judge or jury may receive a new trial, do not support petitioner's proposed, general rule of automatic reversal. And, again, petitioner has never claimed that Gomez should have been excused for cause, nor could he, and therefore this case does not involve an unconstitutionally biased decision-maker.[7]

---

[7] Petitioner also cites *Young v. United States ex rel. Louis Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (Pet. 15-16), involving a conflicted prosecutor rather than a biased judge or jury, but that case, too, turned on compelling indicia of partiality. In *Young*, a private attorney prosecuted a criminal contempt charge against his client's adversary—a patent conflict condemned by law and ethical canons. 481

Second, petitioner relies on decisions involving the purposeful and systematic exclusion of African-Americans and other groups from grand and petit jury service. But as these decisions and others in the same line make clear, reversal is required in such cases to deter discrimination and safeguard broader societal interests, including those of the excluded juror, not to comply with an hypothesized, automatic-reversal rule applicable whenever a tribunal is improperly constituted. See generally *Edmonson*, 500 U.S. at 616 ("Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors.").

Thus, in *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946), the Court concluded that the intentional exclusion of day laborers from the jury rolls did "violence to the democratic nature of the jury system" and, if permitted to continue, "would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status." *Id.* at 223-224. Not only was it essential to deter this misconduct and "guard against the subtle undermining of the jury system," but the Court identified the exclusion of day laborers as the real harm, regardless of "whether the petitioner was in any way prejudiced by the wrongful exclusion." *Id.* at

---

U.S. at 805. As petitioner recognizes (Pet. Br. 18), moreover, this Court reversed the conviction in *Young* under the Court's general *supervisory* power. See 181 U.S. at 808. (The same was true of the civil judgment in *Thiel v. S. Pac. Co.*, 328 U.S. 217, 225 (1946).) This Court has no supervisory authority over state courts. See, *e.g.*, *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

225. The Court thus felt compelled to exercise its supervisory power over the lower federal courts and reversed the judgment, recognizing that proceeding in this manner eliminated the need to find prejudice. See *ibid.*

Likewise, in *Peters v. Kiff*, 407 U.S. 497 (1972), where African-Americans were systematically excluded from the defendant's grand and petit juries, a majority of the Court ordered a new trial for a white defendant—not because the Court believed he was prejudiced, but because of the broader harms that discrimination inflicts and the fact that the discrimination itself, regardless of its effect on the trial, violated the Constitution and federal law. See *id.* at 494, 498-499 (violation of federal criminal law and Constitution "occur[s] whether the defendant is white or Negro, whether he is acquitted or convicted," and requiring a showing of prejudice "takes too narrow a view of the kinds of harm that flow from discrimination in jury selection") (Op. of Marshall, *J.*); *id.* at 505-507 (relying heavily on federal statute criminalizing discrimination in access to jury service) (Op. of White, *J.*).

Vasquez v. Hillery, 474 U.S. 254 (1986), makes even clearer that its rule requiring reversal in cases of purposeful and systematic racial discrimination in jury service stems from the unique need to deter this misconduct: "the remedy we have embraced for over a century the only effective remedy for this violation is not disproportionate to the evil that it seeks to deter." *Id.* at 262 (footnote omitted); see also *id.* at 262 n.5 (citing *Rose v. Mitchell*, 443 U.S. 545 (1979), which provides, in part, "we believe such costs as do exist [in requiring automatic reversal] are

outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice," *id.* at 558); see also *Vasquez*, 474 U.S. at 266 ("the admittedly costly remedy of reversal of a conviction * * * obtained through a fair trial is necessary in order to eradicate and deter such discrimination") (O'Connor, J., concurring).

In sum, authorities involving adjudicator bias or intentional discrimination in jury composition are inapposite. Petitioner did not seek to remove Gomez for cause and has never purported to establish that she was actually biased. See generally *Beck v. Washington*, 369 U.S. 541, 557-558 (1962) ("The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinion as to his guilt."). And far from vindicating anti-discrimination principles, petitioner seeks a rule that would undercut those principles by requiring automatic reversal anytime a judge errs in a good faith effort to prevent a *Batson* violation.

C. Petitioner's Proposed Rule Would Require A New Trial For The Misapplication Of Countless State Procedural Rules.

If petitioner were correct and all "defects" in the composition of state law tribunals resulted in automatic reversal under federal law, that would "federalize" and require automatic reversal for any misapplication of countless state procedural rules even if state courts found those errors *de minimus* or subject to harmless-error analysis. Such an outcome runs contrary to common sense and settled

law, including the fundamental tenet that constitutional protections have "never depended on the law of the particular State in which" the alleged violation occurs. *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008) (internal quotations omitted); see generally *Fuller v. Johnson*, 158 F.3d 903, 908 (5th Cir. 1998) (on habeas review, rejecting due process claim that juror whom "Texas law disqualified" sat on jury, where state law violation did not "render[] the trial as a whole fundamentally unfair"); *Patterson*, 215 F.3d at 779-782 (reversal not required even though trial court violated federal jury selection process).

Under petitioner's rule, the vagaries of state law would determine whether otherwise impartial jurors were "unlawful adjudicators." Thus, for example, a court's error in mistakenly seating jurors aged 18, 19, or 20 in Mississippi, see Miss. Code Ann. § 13-5-1 (2008), or Missouri, see Mo. Rev. Stat. § 494.425 (2008), or 18 in Nebraska, see Neb. Rev. Stat. § 25-1601 (2008), would trigger automatic reversal as a matter of federal law, even though these jurors had attained the federal age of majority, see U.S. Const. amend. XXVI, § 1. On the other end of the spectrum, in Connecticut potential jurors over the age of 69 are "disqualified" if they have chosen not to perform jury service. Conn. Gen. Stat. § 51-217(a)(7) (2008). If such a juror were summoned and seated despite having elected not to serve, petitioner's proposed rule would void the entire proceeding.

Whether an otherwise impartial juror would become an "unlawful adjudicator" in this manner would vary from State to State for a host of reasons beyond age. A felon would be an "unlawful adjudicator" as a petit juror in Arkansas but not in Colorado—and in

Connecticut, but only for seven years following conviction. Compare Ark. Code Ann. § 16-31-102(a)(4) (2008) with Colo. Rev. Stat. § 13-71-105(3) (2008) and Conn. Gen. Stat. § 51-217(a)(7).

Under petitioner's rule, moreover, courts, including federal courts on habeas corpus review, would need to undertake fact-intensive inquiries into the minutiae of juror residency patterns. In Colorado, for example, the courts would have to determine that each juror resided in the county more than 50 percent of the time and did not reside outside the county for more than 12 months with no intention of returning. Colo. Rev. Stat. §§ 13-71-105(1), (2)(f) (2008); see also *People v. Williams*, 827 P.2d 612, 613 (Colo. Ct. App. 1992) (juror employed by Air Force and awaiting relocation was eligible in Colorado despite paying income tax and voting in Ohio); 705 Ill. Comp. Stat. § 305/2(1) (2006) (individual must be inhabitant of county to serve as petit juror); Cir. Ct. Cook Cty. R. 0.4(c) (listing zip codes for use in drawing jurors for service in specified "Parts" of the county). "The constitutional standard would be only as easy to apply as the underlying state law." *Moore*, 128 S. Ct. at 1606.

* * *

In sum, petitioner is wrong to claim that every violation of state law governing the composition of the jury, or the assignment of the judge for that matter, requires reversal under federal law. This Court has never recognized such a principle, and it would create a federal remedy (and not just any remedy – automatic reversal) for the violation of innumerable state rules, even where, as here, state law itself refuses to treat

those violations as *ultra vires* or extra-jurisdictional acts that void the resulting judgment.

III. The Denial Of Petitioner's Peremptory Challenge Did Not Violate Any Due Process Right.

As an alternative to the federal, automatic-reversal rule that he seeks, petitioner argues that his alleged state law deprivation rises to a due process violation with three, alternative theories: (1) "improperly constituted tribunals" of any kind violate due process; (2) peremptory challenges reduce the risk or appearance of juror bias, in general or on the facts of this case, and therefore due process requires them; or (3) state law creates a protectable interest in peremptory challenges, and the State may not deprive a defendant of this right without procedural due process.

Any effort to "constitutionalize" the right to a peremptory challenge asks the Court to upend a century of jurisprudence, *see* supra p. 12, and threatens other doctrines that presume the non-constitutional nature of the peremptory right. See, *e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 272-273 (2005) (Breyer, J., concurring) (observing with regard to *Batson* line, "the right to a jury free of discriminatory taint is constitutionally protected—the right to use peremptory challenges is not"). This alone is grounds to reject petitioner's due process theories, but these theories also fail on their own terms.

A. The Due Process Clause Does Not "Constitutionalize" All State Law Rules Capable Of Affecting The Composition Of State Juries.

Petitioner also attempts to ground the proposed rule addressed in Part II—"that proceedings be adjudicated" only by those with state law "authority"—in the federal Due Process Clause. Pet. Br. 19. But this effort fails for the reasons set forth in that Part. It is impossible to square with this Court's rejection of the theory "that any error which affects the composition of the jury must result in reversal," *Ross*, 487 U.S. at 87 n.2, for petitioner urges the Court to adopt precisely that theory. And such a rule would "constitutionalize" all manner of state procedural rules, from technical juror eligibility requirements to rules creating substantive or regional divisions among state courts.

Beyond this, there is no support for petitioner's theory in the authority he cites. *Gomez* does not recognize a due process right to the perfect application of state procedural rules. This was a case about a federal judicial officer "exceed[ing] his jurisdiction" under federal law, and the "basic right" described was the right not to have a case resolved by an *ultra vires* tribunal without any jurisdiction to act. 490 U.S. at 876. The Court did not purport to make this determination as a matter of due process. Rather, the Court based its holding on federal law—the Magistrates Act—and its conclusion that under that law the magistrate behaved in an unlawful, *ultra vires* manner, meaning his decision was without legal effect. See *supra* p. 18. *American Construction* likewise turned on the limits of federal court jurisdiction as a

matter of federal law, see *supra* p. 19, whereas it is for Illinois law to decide whether error resulting in the loss of a peremptory challenge makes the resulting jury verdict a legal nullity.

Finally, petitioner cites *William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 650 (1913), for the principle that an unlawfully constituted court is "'virtually no court at all.'" Pet. Br. 20. True enough, as a matter of federal law. See 228 U.S. at 641. But the Court did not purport to announce a rule of constitutional dimension, much less to deprive States of their authority to determine the legal effect of any missteps in the composition of state courts or juries. While some mistakes in the application of state law may produce unconstitutional results, it simply is not *per se* unconstitutional to misapply state law, as petitioner must claim.

B. Neither The Undefined Risk Of Bias In Jurors Not Subject To Removal For Cause, Nor The Specific Facts Of This Case, Requires The Recognition Of A New Due Process Right.

Petitioner also argues that due process entitles him to peremptories because these challenges can reduce the risk or appearance of jury bias, because Gomez or other jurors may have become biased against him, and because the State purportedly obtained an "undue influence over the composition of [his] jury." Pet. Br. 27-37. These claims are meritless, and none is grounds to overturn well settled law and recognize a novel due process right. Indeed, this Court has rejected the argument "that the requirement of an 'impartial jury'

impliedly *compels* peremptory challenges." *Holland v. Illinois*, 493 U.S. 474, 481-482 (1990).

1. There Is No Due Process Right To Peremptories On The Ground That They Reduce The Risk Or Appearance Of Juror Bias.

Petitioner first cites the need for an "'appearance of justice'" and a desire to avoid "'the likelihood or the appearance of [juror] bias.'" Pet. Br. 27 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954), and *Peters*, 407 U.S. at 502). He asks this Court to recognize a constitutional entitlement to peremptories because "actual bias is rarely obvious" in juror questioning, "not all individuals will pick up on * * * nonverbal cues" suggesting bias, and for cause challenges can be difficult to sustain. Pet. Br. 31-34. But petitioner does not complain that the trial court erroneously denied a for cause challenge here, for petitioner never sought to remove Gomez on that basis, nor does he identify any "nonverbal cues" that would have indicated any bias on her part. Instead, petitioner appears to argue that the factors he identifies make for cause challenges imperfect as a general matter, and he seeks to give peremptories a constitutional dimension as an additional, prophylactic defense against the mere "risk" or "appearance" of bias. Pet. Br. 27. This argument fails.

The authority on which petitioner relies does not support making peremptories constitutional; it merely reaffirms the constitutional entitlement to *for cause* challenges. Like *Tumey* and *Murchison*, see *supra* p. 21, *Offutt* involved a judge with a direct stake in the proceedings. He had become "personally embroiled"

with an attorney during trial, to the point where the judge openly "demonstrated a bias and lack of impartiality." 348 U.S. at 16-17 (internal quotations omitted). Because the judge manifested such sustained, "personal animosity" toward counsel, this Court exercised its supervisory power (without invoking due process) to bar the judge from adjudicating the attorney's ensuing criminal contempt charge. *Id.* at 16-18.

The "'likelihood or the appearance of bias'" language on which petitioner relies from *Peters* (Pet. Br. 27), refers to equally compelling evidence of partiality based on an obvious conflict or personal stake in the proceeding. Specifically, *Peters* explained that the "likelihood" or "appearance' of bias at issue there was the same obvious, implied partiality at work in *Tumey* and *Murchison*, where judges had a direct interest in the case's outcome. See 407 U.S. at 502 (Op. of Marshall, *J.*). *Peters* also cited *Turner v. Louisiana*, 379 U.S. 466, 469 (1965), in which the State's two key witnesses were deputy sheriffs who stayed with the sequestered jurors. To be sure, *Turner* involved a mere "likelihood" of bias in that it did not force the defendant to prove that jurors were actually impartial because of their "continuous and intimate association" with the witnesses, *id.* at 473, just as *Tumey* did not require any actual showing that the judge who was paid only for convictions actually convicted defendants out of financial self-interest. *Peters*, 407 at 502 (Op. of Marshall, *J.*) (observing that *Tumey* reversed the judge's decision "notwithstanding the possibility that he might resist the temptation to be influenced by [his financial] interest"). The "prejudice" was simply "inherent" in such an "intimate" relationship between

the jury and the State's lead witnesses, *Turner*, 379 U.S. at 473, just as it would be if a potential juror revealed a direct, personal stake in the outcome of a trial. In short, far from supporting a constitutional right to peremptories, the foregoing cases were based on the same strong evidence of partiality that would support a juror's removal for cause. See, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 351-355 & n.9 (1966) (rejecting juror assurances of impartiality in light of intense publicity surrounding crime and trial, and summarizing other decisions by Court presuming prejudice notwithstanding juror claims of impartiality); *Conaway v. Polk*, 453 F.3d 567, 586-588 (4th Cir. 2006) (describing history and ongoing prevalence of "implied bias" basis for excusing jurors for cause); *Polichemi*, 219 F.3d at 704 ("[A] court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case.").

Petitioner asks the Court to go far beyond *Offutt*, *Tumey*, and *Turner* and declare a much broader constitutional rule—one that not only entitles parties to exclude jurors exhibiting the sort of implied bias at work in those cases (and that should sustain a for cause challenge), but further entitles parties to remove any juror who poses a less apparent or more indirect potential for bias. Consistent with the constitutional line between for cause and peremptory challenges, however, this Court has never required perfection, such that any slight "risk" or "appearance" of juror bias violates due process. See, *e.g.*, *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("due process does not require a new trial every time a juror has been placed in a potentially compromising situation"); *Nebraska Press*

Ass'n v. Stuart, 427 U.S. 539, 568-569 (1976) (acknowledging "risk that pretrial news accounts * * * would have some adverse impact on the attitudes of those who might be called as jurors," but finding record insufficient to show that additional publicity "would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court").

Petitioner also observes that peremptory challenges enjoy a long history, but this is not grounds to recognize a new due process entitlement, and in any event the history is not nearly as one-sided as petitioner paints it. Contrary to his claim (Pet. Br. 29), the challenges *propter affectum* ("for suspicion of bias or partiality") recognized by Blackstone could not be exercised peremptorily; they were "styled challenges *for cause*" and available "without stint in both criminal and civil trials." 4 William Blackstone, *Commentaries* *353. Peremptory challenges were a separate "arbitrary and capricious species of challenge" allowed to the defendant "in criminal cases, or at least in capital ones." *Ibid.*

Moreover, while Blackstone acknowledged peremptory challenges as part of the English legal tradition, whether they were available to criminal defendants in practice is less certain, for "they were so rarely exercised that some scholars have posited that ordinary criminal defendants simply had no 'right' to any peremptory challenges, despite the pronouncements of Parliament." William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1413 (2001). Perhaps not surprisingly given their infrequent use, "from 1305

forward, the number of allowable defense peremptory challenges in English criminal trials steadily decreased," before they were abolished altogether in 1989. *Ibid*; see also *Miller-El*, 545 U.S. at 272 (Breyer, *J.*, concurring).

And while petitioner champions the use of peremptory challenges to root out juror bias (Pet. Br. 30), Blackstone acknowledged their deployment for illegitimate purposes. See 4 *Commentaries* *354 (defendants who attempted to exceed their allotted number of peremptories were severely penalized to deter their use to delay trial). Concerns about the improper use of peremptory challenges persist today. See, *e.g.*, *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, *J.*, concurring) (noting an "unresolvable tension between, on the one hand, what Blackstone called an inherently 'arbitrary and capricious' peremptory challenge system and, on the other hand, the Constitution's nondiscrimination command"); see also Major Robert Wm. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, 183 Mil. L. Rev. 1, 64 (2005) (peremptories "are simply a vehicle for insulting stereotypes with the hope that those stereotypes work in a party's favor"); Pizzi & Hoffman, *supra*, at 1429 (peremptory challenges "do not have, and have never had, much to do with selecting impartial jurors").

Finally, petitioner observes that every State currently offers peremptory challenges. Pet. Br. 31 (citing electronic database). But the catalogue of state rules on which petitioner relies also highlights the incredible disparity among jurisdictions in the number of challenges available and in the many other rules surrounding their use. This variety alone, and the

limits States place on the use of peremptories, is impossible to square with the conception of these challenges as a constitutional entitlement. If due process required peremptories to avoid any "risk" or "appearance" of bias, then there could be few if any limits on the number or manner of their use.

2. No Risk Of Bias In This Case Warrants The Recognition Of A Novel Due Process Right.

Although avoiding a risk of bias has never been grounds for recognizing a constitutional entitlement to peremptory challenges, petitioner nevertheless maintains that his proposed rule should apply to his case because the "potential for bias" here was "dramatically highlighted" when his counsel made the contested challenge "in front of Mrs. Gomez and other prospective jurors." Pet. Br. 34. Petitioner overstates the record in making this misplaced argument, however. Although he contends that he was "required" to "announce[]" his challenges "in open court" (Pet. Br. 34), neither Illinois law nor Cook County's local rules demand this. Had petitioner discerned some inherent prejudice in this practice, he could have sought the court's permission to raise his challenges outside of the prospective jurors' presence. Because he did not do so, he may not complain now about the trial court's methods. Moreover, if a juror is presumed biased merely because she knows the defense sought her removal, as petitioner suggests, then defendants could circumvent *Batson* by engaging in prohibited discrimination in the exercise of their peremptory challenges and, when those challenges are properly denied, obtain the challenged jurors' removal for cause

based on "bias" accruing from the challenge process itself.

Further, nothing in either defense counsel's exercise or the trial court's handling of the peremptory challenge raised a risk of bias— "substantial" (Pet. Br. 35) or otherwise. After questioning the third panel, defense counsel informed the trial court—courteously and without elaboration—that, "with thanks, we would ask to exclude Mrs. Gomez." Vol. I at A210. Only once the parties were outside of the prospective jurors' presence did the court request the basis for the challenge. Vol. I at A210-A211. Similarly, after Gomez was questioned a second time, the court waited until she had returned to the jury box before asking the attorneys whether they had further comment. Vol. I at A217-A219. Defense counsel was neither "forced to express his reasons" for striking Gomez in front of her or other prospective jurors, nor did the prosecutor request that the strike be denied in any juror's presence. Pet. Br. 35. The court's care in ensuring that all discussion of Gomez's participation occurred away from prospective jurors, and defense counsel's courtesy in requesting Gomez's excusal, refute any argument that the *voir dire* process might have tainted the jury in this case.

Petitioner's speculation that Gomez may have been biased is also belied by her own testimony. Even when questioned the second time, after counsel asked that she be excused, Gomez stated that she would "be able to fairly view the evidence and follow the instructions and the law." JA 38. Juror assurances that they can be fair and impartial are entitled to weight, see, *e.g.*, *Patton*, 467 U.S. at 1039, and there are no grounds for rejecting them here. Given Gomez's assurances of

impartiality, it is just as plausible that the challenge, if it had any effect at all, merely encouraged her to make every effort to be impartial. Nor is there any reason to conclude that the other jurors chose Gomez as foreperson because of the peremptory challenge, as petitioner speculates. Pet. Br. 35. There are any number of reasons why Gomez might have been selected, including her work experience as a supervisor, or she may have been the only one willing to serve. Either way, there is simply no basis to discredit the jurors' assurances that they, too, could be fair and impartial.

Turning finally to the purported "shift[]" in "the balance of power over the composition of the jury decidedly to the State" (Pet. Br. 36), the prosecution received neither more peremptory challenges than petitioner nor "the right to trump" (*ibid.*) one of his challenges. Of the seven peremptory challenges allocated each side, Vol. I at A4, petitioner exercised four (excluding the disallowed challenge of Gomez) and the prosecution used one, Vol. I at A73, A109, A128, A138; JA 40-41. The trial court alone raised the reverse-*Batson* issue in the first instance and made the decision to seat Gomez, JA 34-36; the prosecution did not "veto" (Pet. Br. 36) one of petitioner's peremptory challenges. In fact, it is *petitioner* who seeks to alter the balance of power, by shifting it to favor the criminal defendant. Under petitioner's proposed rule, if a trial court erroneously overrules two peremptory challenges, one by the State and the other by the defendant, only the defendant automatically receives a new trial. See *State v. Hickman*, 68 P.3d 418, 426 (Ariz. 2003) (automatically reversing erroneous denial

of peremptory challenge "tilts the field in favor of the defendant").

Petitioner's reliance on *Wardius v. Oregon*, 412 U.S. 470 (1973), and *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001) (Pet. Br. 36), is therefore misplaced. *Wardius* involved an Oregon law requiring criminal defendants to provide pre-trial notice of any alibi defense and supporting witnesses, without demanding reciprocal discovery from the prosecution. See 412 U.S. at 471-472 & n.3. No law or rule requires such differential treatment here; at worst, the trial court erroneously but in good faith seated an unbiased juror by misapplying a *Batson* rule that limits prosecution and defense peremptories alike. If this amounts to a due process violation, it is hard to conceive of a trial court error that would not. And in *Harbin*, the court held that a trial court's "unprecedented" error in allowing the prosecution to exercise a peremptory challenge mid-trial, after it "had significant opportunity to observe the demeanor of the juror, and to assess whether the alternate would be more favorable," warranted automatic reversal because the error did not merely "prevent[] the defendants from maximizing the strategic use of their peremptory challenges"; it allowed the prosecution "exclusive, discretionary control over the composition of the jury mid-trial." 250 F.3d at 537, 547-548.

C. Property-Based Due Process Standards Do Not Apply To State Rules Of Criminal Procedure, But Petitioner Received All The Process He Was Due In Any Event.

Finally, petitioner claims that the trial court's good faith but erroneous decision to seat Gomez "arbitrar[ily]" deprived him of a "protectable interest in the expectation that petitioner's lawful challenge of Ms. Gomez would be respected." Pet. Br. 37-38. This procedural due process claim fails, both because a good faith but erroneous application of state peremptory challenge law does not transgress the Due Process Clause's guarantee of fundamental fairness at a criminal trial, and because petitioner received more than adequate process.

Violation of a state rule of criminal procedure does not offend due process. See *Estelle v. McGuire*, 502 U.S. 62, 67-73 (1991); see also *United States v. Lane*, 474 U.S. 438, 446 & n.8 (1986) (same regarding violation of federal rule of criminal procedure). As this Court has explained, while its cases "have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," "it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure." *Estelle*, 502 U.S. at 70. Petitioner's reliance on *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Pet. Br. 37), is thus misplaced, for those cases addressed due process claims in the civil context. See *Roth*, 408 U.S. at 578 (non-tenured professor had no protected interest in continued employment); *Logan*, 455 U.S. at 429 (discharged employee had protected interest in state

Fair Employment Act's adjudicatory procedures because "the Due Process Clauses protect civil litigants who seek recourse in the courts").

In the criminal context, an error violates due process only if it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial," *Lane*, 474 U.S. at 446 n.8, or "'so infuse[s] the trial with unfairness as to deny due process of law,'" *Estelle*, 502 U.S. at 75 (quoting *Lisenba v. California*, 314 U.S. 219, 228 (1941)). The Court has "'defined the category of infractions that violate fundamental fairness very narrowly,'" for "'[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" *Estelle*, 502 U.S. at 73 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). This standard is not met here. The most petitioner can show is that the trial court's erroneous denial of his peremptory challenge resulted in the seating of a juror who was qualified to serve under Illinois law and impartial within the meaning of the Sixth Amendment. He cannot demonstrate that the seating of this juror infused the trial with fundamental unfairness. Petitioner's citation of *Logan* also suggests that he would rely on the analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976). But "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which * * * are part of the criminal process." *Medina v. California*, 505 U.S. 437, 443 (1992). The "fundamental fairness" approach applied in criminal cases is "far less intrusive than that approved in *Mathews*." *Id.* at 446.

But even if it were "necessary to ask what process the State provided and whether it was constitutionally

adequate," *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), petitioner plainly received the requisite opportunity to be heard "at a meaningful time and in a meaningful manner," *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (internal quotations omitted), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330 (1986). Prior to denying the peremptory challenge, the trial court, acting on a good faith belief that the challenge violated *Batson*, heard argument from both sides. JA 34-35. On defense counsel's urging, the court permitted further questioning of Gomez and created a record establishing its rationale for seating her. JA 35-41. Then, after the denial of the peremptory challenge, petitioner received post-deprivation process including two appeals to the Illinois Supreme Court and a supplemental hearing before the trial court. JA 130-132, 136, 157-163. The Illinois courts' comprehensive review of the matter was more than sufficient to satisfy due process. See *Sunal v. Large*, 332 U.S. 174, 182-183 (1947) ("Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process.") (citing *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935) (Cardozo, J., writing for the Court)).

Petitioner's authority (Pet. Br. 37-38) is not to the contrary. *Hicks v. Oklahoma*, 447 U.S. 343 (1980), held that sentencing by a jury unaware of its discretion to impose a lower sentence deprived the defendant of due process because the error actually prejudiced him. Had the jury been properly instructed, there was a "substantial" possibility that it would have returned a lesser sentence, making the imposed sentence

"arbitrary" in violation of due process. *Id.* at 346. In contrast, petitioner seeks automatic reversal, without any showing of prejudice. And because the State provided him with meaningful pre- and post-deprivation process, he cannot claim arbitrary treatment.

That the Illinois Supreme Court ultimately held Gomez should not have been seated does not mean the trial court acted arbitrarily. At worst, the trial court misapplied *Batson* in good faith, though there are strong grounds to conclude that, as the Illinois Appellate Court held, the trial court correctly overruled petitioner's challenge.[3] At the time defense counsel struck Gomez, he had challenged two of three African-American women and used three of four strikes against women, thus appearing to satisfy *Batson*'s easily met first-stage requirement that the court find an "inference of discriminatory purpose." 476 U.S. at 93-94. And when defense counsel confirmed that he had challenged Gomez, at least in part, to get some "impact" from men on the predominantly female jury, the trial court could reasonably conclude that the existence of a *prima facie* case was irrelevant. See *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality op.). "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Ross*, 487 U.S. at 91 (internal quotations omitted).[4] Given that

---

[3] This is an independent ground for affirming the judgment below, as set forth in the Brief in Opposition. See Br. in Op. 26-29.

[4] In *Ross*, the Court suggested that a claim that "the trial court repeatedly and deliberately misapplied" a State's law

even negligent deprivations do not violate due process, see *Daniels*, 474 U.S. at 328, a reasonable, good faith error—if the trial court in this case erred at all—does not, either.

Petitioner's reliance on *Douglas v. California*, 372 U.S. 353 (1963), and *Evitts v. Lucey*, 469 U.S. 387 (1985), is equally misplaced. These decisions turn chiefly on alleged equal protection violations—a claim petitioner has never made. *Douglas* held that a State engages in prohibited discrimination against the indigent if it creates an entitlement to a direct criminal appeal without also providing for appointment of counsel. See 372 U.S. at 357 ("[W]e think an unconstitutional line has been drawn between rich and poor."). And *Evitts* extended *Douglas* to guarantee effective counsel on appeal. See *Evitts*, 469 U.S. at 394. Because equal protection principles are irrelevant here, *Douglas* and its progeny are inapposite. To be sure, *Evitts* stated that both due process and equal protection concerns "were implicated in" *Douglas*. 469 U.S. at 405. But equal protection was clearly the predominant analysis. See *Douglas*, 372 U.S. at 357 (referring to "fair procedure" only in passing); *Lewis v. Casey*, 518 U.S. 343, 372 n.3 (1996) (Thomas, J., concurring) (characterizing *Evitts* as "unpersuasive" in its effort to ground the *Douglas* rule in due process). In any event, "as a practical matter" in *Douglas* and its progeny "the * * * Clauses largely converge to require that a State's procedure affor[d] adequate and effective

---

of peremptory challenges might violate the Constitution. 487 U.S. at 91 n.5. Of course, no such claim is possible here.

appellate review to indigent defendants." *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (plurality op.) (internal quotations omitted). This means "reasonably ensur[ing] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 276-277. Far from the "meaningless ritual" that the Court sought to avoid in *Douglas* and *Evitts*, 372 U.S. at 358; 469 U.S. at 394, petitioner received a meaningful pre-deprivation hearing and full appellate review.

IV. The Erroneous Denial Of A Peremptory Challenge Is Amenable To Harmless-Error Review.

As an "independent reason" for his automatic-reversal rule, petitioner urges that it is impossible to review the erroneous seating of Gomez for harmlessness because one cannot know how a hypothetical "replacement juror" would have "viewed the evidence and participated in deliberations." Pet. Br. 20, 22. As discussed, however, before there can be federal, structural error in this case, there first must be some deprivation of a federal right, and no such deprivation occurred here. And even if seating Gomez violated a federal right, the error still would not qualify as structural, because difficulty of assessment is not the controlling criterion for identifying structural error, and because the effect of the erroneous seating of an unbiased juror is not difficult to assess.

Although "there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (*per curiam*) (internal quotations omitted). "'[M]ost constitutional errors can be

harmless,'" and this Court has required automatic reversal "only in rare cases." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (quoting *Neder*, 527 U.S. at 8). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption than any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Recuenco*, 548 U.S. at 218 (internal quotations omitted). Accordingly, the Court discounted the statement in *Swain* that "reversal" is required "whenever a defendant's right to a certain number of peremptory challenges is substantially impaired." *Martinez-Salazar*, 528 U.S. at 317 n.4. Not only was this statement *dicta*, the Court reminded, but it "was founded on a series of our early cases decided long before the adoption of harmless-error review." *Ibid.*

Petitioner nevertheless seeks to place the trial court's purported error in the narrow category of structural defects because, he posits, the error's effect "cannot be ascertained." Pet. Br. 22. Even if that were true (and it is not, see *infra* pp. 47-49, 53), there is no "single, inflexible criterion" for identifying structural defects. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). This Court considers multiple "determining factor[s]," including whether the trial was characterized by "fundamental unfairness." *Ibid.* (internal quotations omitted). And it has reviewed for harmlessness even errors that "infringe upon the jury's fact-finding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable," so long as the errors "do[] not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9, 18. True to this approach, Judge

Kozinski has endorsed harmless-error review under the present circumstances—even while acknowledging that it cannot be known to a certainty what would have happened if a replacement juror had been seated. See *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (*en banc*) (Kozinski, *J.*, dissenting) (reaching this result because harmless-error review "reflects more accurately [this] Court's teaching" and preserves "the viability of peremptory challenges"). In short, mere "inability to trace adverse effects to a mistake does not justify reversing a conviction"; to the contrary, it may "show[] instead that there is no warrant for disturbing the judgment." *Patterson*, 215 F.3d at 782 (citing *United States v. Morrison*, 449 U.S. 361 (1981)).

Petitioner is thus wrong to suggest that difficulty in assessment necessarily requires automatic reversal. But even if this were the controlling criterion, there is no such difficulty here. Parties have a right to an impartial jury, not to jurors of their choosing. See, *e.g.*, *Frazier*, 335 U.S. at 508. Thus, the focus of appellate review in cases of purported jury prejudice is "the jurors who ultimately sat," *Ross*, 487 U.S. at 86, specifically, whether any juror was biased and thus challengeable for cause. This is the standard the Court applied in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), where it held that a juror's failure to answer a material question honestly on *voir dire*—"prejudic[ing] [the] right to peremptory challenge"—warranted a new trial only if that failure violated the "right to an impartial jury" because "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 549, 556 (internal quotations omitted); see also *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (unrecorded *ex parte*

communications between trial judge and juror were harmless because "the jury's deliberations, as a whole, were not biased").

This is also the standard applied by lower courts rejecting petitioner's automatic reversal rule. See, *e.g.*, *Busby v. Florida*, 894 So.2d 88, 104 & n.14 (Fla. 2004) (noting that majority of state courts have adopted harmless-error rule, but automatically reversing based on *state* constitutional protections); *id.* at 110 & n.23 (Bell, *J.*, concurring in part and dissenting in part); *Klahn v. Wyoming*, 96 P.3d 472, 483 (Wyo. 2004) (majority of state courts have adopted harmless-error rule); *State v. Lindell*, 629 N.W.2d 223, 246 & n.14 (Wis. 2001) (same); *State v. DiFrisco*, 645 A.2d 734, 753 n.1 (N.J. 1994) (22 state courts and several federal circuit courts have adopted harmless-error rule); *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1994) (19 state courts have adopted harmless-error rule).[5] Consistent with *McDonough* and *Rushen*, these courts have reversed only on a showing that "a biased juror actually sat on the jury panel," *e.g.*, *Busby*, 894 So.2d at 104, in other words, where the panel included a juror who was "not qualified to serve" and should have been removed for cause, *e.g.*, *Klahn*, 96 P.3d at 483-484. If none of the jurors were legally objectionable, then the defendant was not prejudiced and the

---

[5] These decisions address whether automatic reversal is required where a defendant cured an erroneous denial of a for cause challenge by "wasting" a peremptory challenge. As petitioner has acknowledged, insofar as this kind of error may "result in an individual sitting on the jury who would not have," the issue is the "same" as the question presented here. Pet. 3.

conviction stands, thus avoiding the "disturbing" result of "requir[ing] a new trial in cases," like petitioner's, "where the trial was nearly perfect and the verdict is unquestionably sound." *Lindell*, 629 N.W.2d at 249.

The inquiry into whether any juror was challengeable for cause is easily undertaken, and courts, including this Court, are accustomed to performing it. See, *e.g.*, *Patton*, 467 U.S. at 1036-1040; *Irvin*, 366 U.S. at 727-728. The inquiry is especially straightforward here. Petitioner did not challenge Gomez for cause and has never suggested that she was not legally qualified to serve. JA 164. Gomez gave full and frank answers and repeatedly stated that she would judge petitioner's case fairly, without influence from factors other than the law and the evidence. JA 32-33, 36-38. On this record, the Illinois Supreme Court's holding that "there is no evidence that [petitioner] was tried before a biased jury, or even *one* biased juror" was indisputably correct. JA 164. Thus, even if the trial court erred in denying the peremptory challenge and seating Gomez, that error does not warrant reversal of petitioner's conviction. Petitioner received the impartial jury to which he was entitled.

Moreover, a court undertaking harmless-error review in this manner does not need to "offer[] its own independent evaluation" of "the record as a whole" or otherwise permit the judge, rather than the jury, to determine guilt. Pet. Br. 26. Review for harmlessness therefore does not run afoul of the prohibition on directed verdicts of guilt. See *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In contrast, petitioner's rule, requiring no actual demonstration of bias, raises substantial practical concerns. Without a showing that the seated juror was legally objectionable, the

rebuttable presumption that a juror is impartial, see, *e.g.*, *Irwin*, 366 U.S. at 723, must be ignored or turned on its head. Further, a defendant could peremptorily challenge a clearly neutral or even defense-friendly juror and still be entitled to a new trial merely because the trial court erroneously applied *Batson* in denying the challenge. And by "making every error in th[e] delicate process" of enforcing *Batson* "fatal," *Annigoni*, 96 F.3d at 1151 (Kozinski, *J.*, dissenting), the rule would discourage trial courts from monitoring discriminatory use of peremptory challenges by criminal defendants.

Here, the Illinois Supreme Court went even further. Not only did the court conclude that Gomez was not biased and therefore not removable for cause—alone sufficient grounds to hold that any error in this case was harmless—but the court proceeded to determine that the evidence against petitioner was so "overwhelming" that "any rational trier of fact" would have convicted. JA 164-165, 171. There was nothing improper about this additional inquiry, and it represents an alternative means to assess harmlessness.

In *Neder*, the Court held that the failure to instruct a jury on one element of an offense was subject to harmless-error review, and that the appropriate test for harmlessness was whether "[i]t is clear beyond a reasonable doubt that a rational jury would have found [petitioner] guilty absent the error." 527 U.S. at 15, 18. The Illinois Supreme Court followed *Neder*'s "rational jury" test to the letter. Even petitioner does not challenge the determination that no rational jury would have acquitted him, no doubt because the trial evidence allows no other result. JA 166-169. And

while *Neder* anticipates cases where reversal is required because a court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," 527 U.S. at 19—for example, because the evidence is closely balanced and thus sufficient to support either a conviction or an acquittal—the Illinois Supreme Court's undisputed findings demonstrate that this is not such a case. Accordingly, even under this more rigorous harmless-error test, petitioner's conviction must stand.

Neder also expressly refutes petitioner's argument that *Sullivan* and other cases prohibiting directed verdicts preclude any "evaluation of whether a rational jury could have acquitted" him. Pet. Br. 26. The Court there emphasized that "[a] reviewing court making this harmless-error inquiry does not * * * become in effect a second jury to determine whether the defendant is guilty." *Neder*, 527 U.S. at 19 (internal quotations omitted). Instead, the "court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding." *Ibid.* The Court acknowledged tension with *Sullivan*, because, as a result of the trial court's error, the jury had not rendered a verdict "on *every* element of the offense," as *Sullivan* seemed to require, 527 U.S. at 11. But the Court overruled *Sullivan* to the extent, if any, that it conflicted with the holding in *Neder*. See *ibid.* ("this strand of the reasoning in *Sullivan* * * * cannot be squared with our harmless-error cases").

Seeking to avoid *Neder*, petitioner both tries to limit that decision to its facts and asserts that the Illinois Supreme Court "misread" it. Pet. Br. 24-26. On petitioner's first point, this Court has never suggested that *Neder*'s import is limited to instructional errors.

And as for the contention that the state supreme court improperly relied on *Neder* "to conduct a wholesale evaluation of the entire record" (Pet. Br. 25), this ignores the distinction between a judge concluding that the evidence cannot rationally support a verdict different from the jury's and the judge reaching a verdict in the first instance. In this regard, this case is a better candidate for harmless-error review than *Neder*. Here, a properly instructed, fully qualified jury rendered a complete verdict against petitioner, and the Illinois Supreme Court merely confirmed that verdict as overwhelmingly supported by the evidence. In no sense did the court "vitiate all the jury's findings," much less make a judgment that a jury never made. See *Neder*, 527 U.S. at 27 ("the 'harmless-error' doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings") (internal quotations omitted) (Stevens, *J.*, concurring in part and concurring in judgment); *id.* at 38 ("Harmless-error review applies only when the jury *actually renders* a verdict—that is, when it has found the defendant guilty of all the elements of the crime.") (Scalia, *J.*, dissenting).[6]

---

[6] Petitioner also argues that the Illinois Supreme Court violated a prohibition against "look[ing] at the quality or quantity of evidence in a particular case" when "determin[ing] *whether* to apply harmless-error analysis" (Pet. Br. 25 n.5) (emphasis added), but that is incorrect. The lower court considered the evidence only after finding that harmless-error analysis applied, to determine whether reversal was warranted under that standard. JA 166-171.

Not only is the Illinois Supreme Court's approach fully consistent with *Neder*, but it raises no problems in application. As explained, see *supra* pp. 46-47, difficulty of assessment is neither the sole nor determining criterion in deciding whether harmless error applies. But in any event it is not difficult to assess the impact of an erroneously seated yet unbiased juror. A reviewing court need merely determine whether the evidence as set forth in the trial record is such that no rational jury would have acquitted. This is an analysis that courts, including this Court, are long accustomed to undertaking. See, *e.g.*, *United States v. Hasting*, 461 U.S. 499, 510-512 (1983) (given "overwhelming evidence of guilt," it was "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" even absent prosecutorial misconduct); *Schneble v. Florida*, 405 U.S. 427, 431-432 (1972) (because evidence of guilt was "overwhelming," "the minds of an average jury" would not have changed even absent Confrontation Clause error). The only way petitioner can claim that courts are not capable of this analysis is to engage in forbidden argument that he was entitled to an irrational juror. See *Schneble*, 405 U.S. at 431-432 ("[j]udicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior").

Moreover, because jurors have no role in creating the trial record, harmless-error review under these circumstances cannot be characterized as "a speculative inquiry into what might have occurred in an alternate universe," as in *Gonzalez-Lopez*, 548 U.S. at 150. Jurors receive and process information; they do not create "the framework within which the trial

proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In this regard, jurors differ from attorneys and judges, making cases applying automatic reversal to certain errors in determining legal representation (*Gonzalez-Lopez* and *Holloway v. Arkansas*, 435 U.S. 475 (1978)) and the proper adjudicator (*Wingo* and *William Cramp & Sons*) inapt. Attorneys make "myriad" decisions that determine the very form that the trial record takes: "[d]ifferent attorneys will pursue different strategies," and these strategic choices will affect not only jury selection but also "investigation and discovery," "development of the theory of the defense," "presentation of the witnesses," and the "style of witness examination and jury argument." *Gonzalez-Lopez*, 548 U.S. at 150-151; see also *Holloway*, 435 U.S. at 490-491 (noting diverse "options, tactics, and decisions" available to attorneys). Likewise, judges exercise discretion over what evidence will be disclosed during discovery and admitted at trial, giving them a substantial role in the development of the trial record. Accordingly, when reviewing a juror-seating error for harmlessness, there is no need to imagine what the record would look like under different circumstances.

Petitioner's reliance on *Gonzalez-Lopez* is misplaced for an additional reason. Although the Court there found that the deprivation of an affirmative right—defendant's entitlement to representation by a specific attorney—was not amenable to harmless-error review, petitioner claims a negative right not to have a particular person on his jury. Thus, petitioner's claim is less like the one made in *Gonzalez-Lopez* and more akin to the claim in *Strickland v. Washington*, 466 U.S. 668 (1984), where this Court held that the deprivation of an analogous negative right—the defendant's right

not to be represented by the particular, ineffective attorney who handled his case does not require automatic reversal but instead is reviewed for prejudice. See *id.* at 687, 695.

Cases finding structural error in certain mistakes affecting jury composition (*Vasquez* and *Peters*) are likewise inapposite. As explained, see *supra* pp. 24-25, the *Vasquez* rule was a response to the "overriding imperative to eliminate" discrimination in grand jury selection; difficulty of assessment was but a secondary consideration to the deterrence rationale. 474 U.S. at 264. Equally important, the *Vasquez* rule is limited to errors in grand jury selection, because grand juries, unlike petit juries, have discretion to act notwithstanding the evidence. See *id.* at 263 ("the grand jury is not bound to indict in every case where a conviction can be obtained") (internal punctuation omitted).[7] This freedom makes it impossible to discern whether "the need to indict would have been assessed in the same way by a grand jury properly constituted," *id.* at 264, and thus equally impossible to apply the "rational jury" rule. As for *Peters*, that decision was similarly driven by a desire to eradicate purposeful and systemic race discrimination in jury selection. See *supra* p. 24. In addition, Justice Marshall's opinion that discrimination in the composition of a defendant's

---

[7] Contrary to petitioner's suggestion (Pet. Br. 22), only four members of the Court in *Vasquez* subscribed to the proposition that reversal is required whenever "a petit jury has been selected upon improper criteria * * * because the effect of the violation cannot be ascertained." 474 U.S. at 263 (Marshall, J., with three Justices concurring and one Justice concurring in the judgment).

grand *and* petit juries warranted automatic reversal did not command a majority.

In short, there is no serious dispute that petitioner received a fair trial by an impartial jury and that the trial evidence overwhelming favored his conviction. Any error in this case was harmless for either of these independent reasons.

CONCLUSION

The decision of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

ANITA ALVAREZ
Cook County State's Attorney
JAMES E. FITZGERALD
ALAN J. SPELLBERG
JUDY L. DEANGELIS
Assistant State's Attorneys
309 Richard J. Daley Ctr.
50 W. Washington Street
Chicago, Illinois 60602
(312) 603-5496

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
MICHAEL M. GLICK
KARL R. TRIEBEL
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record

JANUARY 21, 2009

AMICUS CURIAE BRIEF

No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

RITA M. GLAVIN
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the erroneous denial of a peremptory challenge authorized by state law violates a criminal defendant's right to due process and requires reversal of his conviction without any showing that the error affected the outcome of his trial.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 5
Argument:
The erroneous denial of a state criminal defendant's peremptory challenge does not infringe his constitutional rights, and federal law does not mandate automatic reversal of his conviction 8
A. Because the erroneous denial of a peremptory challenge deprives a state defendant of only a state-law right, the applicability of harmless-error review is a question of state law for the state courts 9
B. Petitioner's arguments that the erroneous denial of his peremptory challenge violated due process are unpersuasive 14
1. Due process is not violated merely because an error in jury selection affected the jury's composition 14
2. Seating a juror whom the defendant has peremptorily challenged does not create an unacceptable risk of bias 18
3. The erroneous denial of petitioner's peremptory challenge did not violate procedural due process 20
C. Even if the erroneous denial of a peremptory challenge violated due process, the error would be subject to harmless-error review 23
D. Petitioner's arguments for automatic reversal are unpersuasive 27

Table of Contents Continued: Page

1. Automatic reversal is not required whenever an error affects the composition of the tribunal 27
2. Automatic reversal is not required whenever it is difficult to assess the effect of an error 30
Conclusion 33

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372 (1983) 15
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 23, 31
Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 (1947) 15
Batson v. *Kentucky*, 476 U.S. 79 (1986) 1, 5, 13, 20, 27
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 7, 24, 31, 32
Bute v. *Illinois*, 333 U.S. 640 (1948) 17
Chapman v. *California*, 386 U.S. 18 (1967) 13, 23
Cooper v. *California*, 386 U.S. 58 (1967) 9, 13
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 31, 32
Douglas v. *California*, 372 U.S. 353 (1963) 22, 23
Engle v. *Isaac*, 456 U.S. 107 (1982) 9, 10, 25
Estelle v. *McGuire*, 502 U.S. 62 (1991) 10, 21
Evitts v. *Lucey*, 469 U.S. 387 (1985) 22, 23
Frazier v. *United States*, 335 U.S. 497 (1949) 11, 26, 31
Georgia v. *McCollum*, 505 U.S. 42 (1992) 5, 10, 18
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 24

Cases—Continued: Page

Gomez v. *United States*, 490 U.S. 858 (1989) 15
Gray v. *Mississippi*, 481 U.S. 648 (1987) 28
Gryger v. *Burke*, 334 U.S. 728 (1948) 10
Harrington v. *California*, 395 U.S. 250 (1969) 32
Hebert v. *Louisiana*, 272 U.S. 312 (1926) 17
Hernandez v. *New York*, 500 U.S. 352 (1991) 12, 13
Hicks v. *Oklahoma*, 447 U.S. 343 (1980) 22
Holloway v. *Arkansas*, 435 U.S. 475 (1978) 30, 31
Irvin v. *Dowd*, 366 U.S. 717 (1961) 28
J.E.B. v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994) 9, 12, 26
Lego v. *Twomey*, 404 U.S. 477 (1972) 17
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) 29
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) ... 20
McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984) 26, 29
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 24
Medina v. *California*, 505 U.S. 437 (1992) 21
Moran v. *Dillingham*, 174 U.S. 153 (1899) 15
Murchison, In re, 349 U.S. 133 (1955) 28
Neder v. *United States*, 527 U.S. 1 (1999) ... 5, 23, 24, 31, 32
Nguyen v. *United States*, 539 U.S. 69 (2003) 15, 28
Oregon v. *Hass*, 420 U.S. 714 (1975) 17
Peters v. *Kiff*, 407 U.S. 493 (1972) 27
Pointer v. *United States*, 151 U.S. 396 (1894) 12, 19
Powers v. *Ohio*, 499 U.S. 400 (1991) 27
Pulley v. *Harris*, 465 U.S. 37 (1984) 10

Cases Continued: Page

Rose v. *Clark*, 478 U.S. 570 (1986) 7, 23, 24, 31
Rose v. *Hodges*, 423 U.S. 19 (1975) 10
Ross v. *Oklahoma*, 487 U.S. 81 (1988) ..... *passim*
Rushen v. *Spain*, 464 U.S. 114 (1983) 31
Smith v. *Phillips*, 455 U.S. 209 (1982) 28
Sparf v. *United States*, 156 U.S. 51 (1895) 27
St. Clair v. *United States*, 154 U.S. 134 (1894) 12
Standefer v. *United States*, 447 U.S. 10 (1980) 27
Stilson v. *United States*, 250 U.S. 583 (1919) 9, 12, 24
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 24, 32, 33
Thiel v. *Southern Pac. Co.*, 328 U.S. 217 (1946) 27, 28
Tumey v. *Ohio*, 273 U.S. 510 (1927) 24, 28
United States v. *American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) 15
United States v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1995) 26
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) 24, 30, 31
United States v. *Hasting*, 461 U.S. 499 (1982) 32
United States v. *Lane*, 474 U.S. 438 (1986) 6, 10, 21, 30, 32
United States v. *Marchant*, 25 U.S. (12 Wheat.) 480 (1827) 12
United States v. *Martinez-Salazar*, 528 U.S. 304 (2000) 6, 9, 11, 18, 24
United States v. *Mechanik*, 475 U.S. 66 (1986) 25, 30
United States v. *Olano*, 507 U.S. 725 (1993) 31

Cases—Continued: Page

United States v. *Underwood*, 130 F.3d 1225 (7th Cir. 1997), cert. denied, 524 U.S. 937 (1998) 25
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 24, 27
Virginia v. *Moore*, 128 S. Ct. 1598 (2008) 17, 18
Waller v. *Georgia*, 467 U.S. 39 (1984) 24
Wingo v. *Wedding*, 418 U.S. 461 (1974) 15
Wilkinson v. *Austin*, 545 U.S. 209 (2005) 20
William Cramp & Sons Ship & Engine Bldg. Co. v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913) 15
Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 29

Constitution, statutes and rules:

U.S. Const.:
Art. III 15
Amend. IV 17
Amend. VI 33
Confrontation Clause 31
Amend. XIV (Due Process Clause) 6, 9, 14, 20
Federal Magistrates Act, 28 U.S.C. 631 *et seq.* 15
28 U.S.C. 455(a) 29
Ala. Code § 12-16-60(a)(1) (2005) 16, 17
705 Ill. Comp. Stat. 305/2 (West 2007) 17
Mo. Ann. Stat. § 494.425 (West Supp. 2008) 16, 17
W. Va. Code § 52-1-8(b)(4) (2008) 16
Wyo. Stat. Ann. § 1-11-101(a)(i) (2007) 17

Rules Continued: Page

Fed. R. Civ. P. 60(b) 29
Ill. Sup. Ct. R. 434(d) 2

Miscellaneous:

4 William Blackstone, *Commentaries* 19

In the Supreme Court of the United States

No. 07-9995

MICHAEL RIVERA, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the erroneous denial of a peremptory challenge authorized by state law violates a criminal defendant's right to due process and requires reversal of his conviction without any showing that the error affected the outcome of his trial. The United States has an interest in that issue because its resolution will affect the treatment of similar issues in federal prosecutions.

STATEMENT

Following a jury trial in Illinois state court, petitioner was convicted of first-degree murder and sentenced to 85 years of imprisonment. J.A. 144. On appeal, he challenged the trial court's disallowance under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), of one of his

peremptory challenges. The Appellate Court of Illinois rejected that claim and affirmed his conviction. J.A. 63-93. The Supreme Court of Illinois remanded for the trial court to supplement the record. J.A. 94-133. After the remand, the Supreme Court of Illinois held that the trial court had erroneously denied petitioner's peremptory challenge but that the error was harmless beyond a reasonable doubt. Accordingly, the court affirmed petitioner's conviction. J.A. 144-176.

1. Petitioner, who is Hispanic, was charged with murdering an African-American man by shooting him in the back of his head in the mistaken belief that he was a rival gang member. J.A. 64, 150. During jury selection, each party was allowed seven peremptory challenges, as provided by Illinois Supreme Court Rule 434(d). Before consideration of juror Deloris Gomez, whose seating on the jury is at issue in this case, petitioner had exercised three peremptory challenges, two against women, one of whom was African-American. J.A. 148, 155. Voir dire of Gomez revealed that she was a business office supervisor at an outpatient orthopedic clinic associated with a hospital that treats many gunshot victims. Gomez stated that she had some contact with patients at the clinic but that her interaction with those patients would not affect her impartiality. J.A. 29-33. Petitioner's counsel then sought to exercise a peremptory challenge against Gomez. J.A. 33.

The judge called counsel to chambers, where he expressed concern that petitioner's strike discriminated against Gomez, "an African-American female." J.A. 34. Petitioner's counsel stated that he was "pulled in two different ways" because he knew Gomez "ha[d] some kind of Hispanic connection given her name" but he was concerned that she saw victims of violent crime on a

daily basis. *Ibid.* The judge disallowed the challenge, explaining that Gomez was the second African-American female that petitioner had struck and that counsel's proffered non-discriminatory explanation was not convincing. J.A. 35-36.

Defense counsel then requested and received permission to question Gomez further, out of the presence of the other jurors. J.A. 36. Gomez reiterated that she worked in a separate building from the hospital emergency room and was certain that her limited contact with gunshot victims would not prevent her from viewing the evidence fairly and following jury instructions and the law. J.A. 37-38. After Gomez left the room, petitioner's counsel renewed his peremptory challenge. He noted that "the jury [was] predominantly women" and that he was "trying to also get some impact from possibly other men in the case." J.A. 39. The trial judge reaffirmed his decision to seat Gomez, stating that he found no "cause" to dismiss her and that he would "override" the peremptory challenge. J.A. 40. After exercising one more peremptory challenge, J.A. 100, petitioner proceeded to trial, and the jury found him guilty of murder. J.A. 144.

2. The Appellate Court of Illinois affirmed petitioner's conviction, with one justice dissenting. J.A. 63-93. The court rejected petitioner's contentions that the trial court lacked authority to raise a *Batson* issue *sua sponte* and erred by requiring petitioner's counsel to justify his challenge in the absence of a prima facie case of discrimination. J.A. 67-78. The appellate court further held that the trial court did not clearly err in finding petitioner's challenge discriminatory, because his counsel's purported concern about Gomez's contact with gunshot victims was undercut by the fact that she

worked in a business office in an entirely separate building from the emergency room, and because petitioner's counsel "admitted that he was striking Gomez because she was a woman." J.A. 79.

3. The Supreme Court of Illinois remanded for further proceedings. J.A. 94-133. It held that a trial court may raise a *Batson* issue *sua sponte* only if a prima facie case of discrimination exists. J.A. 118-123. Finding the record insufficient to determine whether a prima facie case existed when the trial court asked petitioner to justify his challenge, the supreme court remanded for the trial judge "to articulate the bases for his *Batson* rulings." J.A. 132.

4. On remand, the trial judge stated that he had concluded that petitioner's challenge was motivated by gender discrimination. J.A. 136. The judge explained that, before challenging Gomez, petitioner's counsel had challenged two other women. The judge noted that, although counsel sought to justify his strike based on Gomez's exposure to victims of violence, Gomez was employed as a supervisor in a building separate from the hospital, and she had testified that she could be fair and impartial. J.A. 135. Finally, the judge observed that counsel admitted that he had sought to exclude Gomez to "balance" the jury with more men. J.A. 136.

5. After the remand, the Supreme Court of Illinois held that the trial court had erroneously denied petitioner's peremptory challenge because no prima facie case of discrimination existed when the court demanded a justification from counsel. J.A. 147-158. The supreme court concluded, however, that the error did not require reversal of petitioner's conviction. J.A. 158-176. Based on its own precedent and precedent from this Court, the state supreme court held that the error was not struc-

tural, but was subject to harmless-error review. J.A. 158-166. The court observed that "the Constitution does not confer a right to peremptory challenges," J.A. 160 (quoting *Batson*, 476 U.S. at 91); rather, they are just one means to help ensure the selection of an impartial jury, J.A. 159. The court acknowledged that "trial before a biased tribunal *would* deprive a defendant of a substantial right and constitute structural error." J.A. 163-164. But the court explained that "there is no evidence that [petitioner] was tried before a biased jury, or even *one* biased juror," especially since he "does not suggest that Gomez was subject to excusal for cause." J.A. 164. The court also rejected petitioner's contention that the error could not be assessed for harm. Relying on *Neder* v. *United States*, 527 U.S. 1 (1999), and two of its own cases, the court held that it was possible to determine that seating Gomez did not prejudice petitioner. J.A. 164-166. The court reasoned that "the evidence" against petitioner was "so overwhelming that no rational jury or juror—would have acquitted [petitioner] of the offense." J.A. 166. Consequently, the court concluded, "Gomez's presence on the jury cannot be said to have prejudiced him." *Ibid.* Because the erroneous denial of petitioner's peremptory challenge was "harmless beyond a reasonable doubt," the court found it unnecessary to decide whether the error was "of constitutional dimension." J.A. 171.

SUMMARY OF ARGUMENT

A. The right of state criminal defendants to exercise peremptory challenges is created by state law, not the Constitution. States may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia*

v. *McCollum*, 505 U.S. 42, 57 (1992). The erroneous denial of a state defendant's peremptory challenge thus deprives him of only a state-law right. And whether harmless-error review applies is likewise a question of state law. This Court therefore should not disturb the state supreme court's holding that reversal of petitioner's conviction is not required because the denial of his peremptory challenge was harmless error.

B. The purportedly erroneous denial of petitioner's peremptory challenge did not violate the Due Process Clause. Deprivation of a state-law right constitutes a due process violation only if it "results in prejudice so great as to deny" the defendant the "right to a fair trial." *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986). The erroneous denial of a peremptory challenge does not do so. This Court has repeatedly held that, if no biased juror actually sits, the loss of a peremptory challenge does not impair the right to an impartial jury. *United States* v. *Martinez-Salazar*, 528 U.S. 304, 313 (2000); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988).

Petitioner contends that any proceeding before a tribunal that includes an unlawful participant violates due process. That rule would inappropriately constitutionalize the numerous and often conflicting jury-qualification rules of the different States, even though many of those rules are unrelated to ensuring an impartial jury. In any event, the juror whom petitioner attempted to strike was not an "unlawful" juror: she satisfied the statutory requirements for jury service under Illinois law, and petitioner has never contended that she was excludable for cause.

The purportedly erroneous denial of petitioner's peremptory challenge also did not deny him procedural due process. State rules of criminal procedure do not

create protected liberty interests. And petitioner received ample opportunity to be heard, both before and after the denial of his challenge.

C. Even if the erroneous denial of a peremptory challenge violated due process, the error would not require automatic reversal. Only a handful of fundamental errors require automatic reversal. Those structural errors deprive the defendant of "basic protections" required in every trial, *Rose* v. *Clark*, 478 U.S. 570, 577 (1986), and generally "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993). The erroneous denial of a peremptory challenge, in contrast, deprives the defendant of only a statutory privilege that States may withhold entirely without violating the Constitution. And the error has no effect on the trial record, the legal arguments presented, or the legal standards to be applied by the judge and jury.

An automatic-reversal rule would require unnecessary retrials, could diminish trial courts' vigilance in policing against unconstitutionally discriminatory strikes, and could cause federal and state legislators to reduce or eliminate peremptory challenges. Reversal should not be required when the denial of a defendant's peremptory challenge did not result in the seating of a biased juror. And reversal should certainly not be required where, as here, the evidence was so overwhelming that any rational juror would have found the defendant guilty.

D. Automatic reversal is not required whenever an error affects the composition of the jury. That rule would require costly retrials for numerous technical errors that did not prejudice the defendant, such as a juror's failure to satisfy state age or residency requirements and a judge's mistaken replacement of a juror

with a fully qualified alternate. The automatic-reversal cases cited by petitioner involve unlawful discrimination in jury selection, biased adjudicators, and judges who lacked any statutory authority under federal law to preside over the proceedings situations very different from the good-faith, erroneous denial of a peremptory challenge.

Automatic reversal is not required whenever it is difficult to assess the effect of an error. This Court has applied harmless-error review to numerous errors whose affects are difficult to assess. The inability to assess harm renders an error structural only if the error denies the defendant a basic protection and infects the entire trial process. The erroneous denial of a peremptory challenge does not have those effects. Moreover, courts can determine that the denial of a peremptory challenge did not affect the outcome of the trial, particularly in cases like this one, where the evidence was so overwhelming that no rational jury could have reached a different result.

ARGUMENT

THE ERRONEOUS DENIAL OF A STATE CRIMINAL DEFENDANT'S PEREMPTORY CHALLENGE DOES NOT INFRINGE HIS CONSTITUTIONAL RIGHTS, AND FEDERAL LAW DOES NOT MANDATE AUTOMATIC REVERSAL OF HIS CONVICTION

The purportedly erroneous denial of petitioner's peremptory challenge violated his rights under Illinois law but did not infringe his rights under the United States Constitution. The appropriate remedy for that state-law violation is a question of Illinois law for the state courts to resolve.

Petitioner attempts to avoid that conclusion by transforming the impairment of his state-created right into a due process violation and by asserting that federal law requires automatic reversal whether or not his constitutional rights were violated. But nothing in the Constitution requires a State to grant peremptory challenges. See *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). And the violation of a state-created right to peremptory challenges, like the violation of most state-law rights, does not violate the Due Process Clause. See *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982). Accordingly, the States are free to develop their own harmless-error tests for violations of that state-created right. See *Cooper* v. *California*, 386 U.S. 58, 62 (1967). This Court should therefore affirm the judgment of the state supreme court holding that any erroneous denial of a peremptory challenge in this case was harmless.

A. Because The Erroneous Denial Of A Peremptory Challenge Deprives A State Defendant Of Only A State-Law Right, The Applicability Of Harmless-Error Review Is A Question Of State Law For The State Courts

This Court has "long recognized" that peremptory challenges "are not of federal constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 311 (2000). Although they "are valuable tools in jury trials," peremptory challenges "are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994) (citation omitted); see, *e.g.*, *Stilson*, 250 U.S. at 586 ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants

in criminal cases."). Indeed, "[t]his Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992).

"Because peremptory challenges are a creature of statute and are not required by the Constitution," the right of a state criminal defendant, such as petitioner, to exercise peremptory challenges derives entirely from state law. *Ross* v. *Oklahoma*, 487 U.S. 81, 89 (1988). The erroneous denial of a peremptory challenge thus deprives him of only a state-law right.

This Court made clear long ago "that a 'mere error of state law' is not a denial of due process" that violates the federal Constitution. *Engle*, 456 U.S. at 121 n.21 (quoting *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948)). "If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'" *Ibid.* (quoting *Gryger*, 334 U.S. at 731) (brackets in original). The Court has repeatedly reaffirmed that principle in numerous cases holding that "federal habeas corpus relief does not lie for errors of state law." *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) (citation omitted); *e.g.*, *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984); *Rose* v. *Hodges*, 423 U.S. 19, 21-22 (1975) (per curiam).

When the deprivation of a defendant's rights under state law does not infringe a specific constitutional guarantee, the error violates the Constitution only if it "results in prejudice so great as to deny" the defendant the "right to a fair trial," *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986), or "so infuse[s] the trial with unfairness as to deny due process of law," *Estelle*, 502 U.S. at 75 (citation omitted). The erroneous denial of a single

peremptory challenge does not meet that test unless it results in the seating of a juror who is actually biased.

This Court made that plain in *Ross*, when it held that a state court's erroneous denial of a for-cause challenge did not violate the defendant's rights to an impartial jury and due process, even though the defendant used one of his peremptory challenges (as required by state law) to remove the juror. 487 U.S. at 87-88, 90-91. Because none of the jurors who actually sat was excludable for cause, the Court "reject[ed] the notion that the loss of [the] peremptory challenge constitute[d] a violation of the constitutional right to an impartial jury." *Id.* at 88. That was true, the Court stressed, even though the error "may have resulted in a jury panel different from that which would otherwise have decided the case." *Id.* at 87.

In *Martinez-Salazar*, the Court extended the holding of *Ross* to a federal defendant who had voluntarily used a peremptory challenge to cure the erroneous denial of a for-cause challenge. 528 U.S. at 307. In doing so, the Court reiterated its earlier conclusion that, if the jury that sits is not biased, the loss of a peremptory challenge does not violate the Constitution. *Id.* at 313.

That conclusion follows from this Court's repeated statements that States control the number of peremptory challenges and may withhold them entirely without violating a defendant's rights to an impartial jury and a fair trial. See, *e.g.*, *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1949). If a State can deny peremptory challenges altogether without violating the Constitution, the erroneous denial of single challenge cannot itself render a trial fundamentally unfair.

That conclusion also follows from the Court's decisions upholding "numerous incursions upon the right to

challenge peremptorily." *Ross*, 487 U.S. at 90 (citation omitted). For example, a defendant may be required to share his peremptory challenges with his co-defendants, even though that requirement reduces the number he may exercise, *Stilson*, *supra*; forces him to use his challenges in a way other than he wishes, see *Ross*, *supra*; or deprives him of a juror he desires, *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827). A defendant may be required to exercise his peremptory challenges simultaneously with the government even if that causes him to waste a challenge on a juror whom the government also challenges. *Pointer* v. *United States*, 151 U.S. 396, 412 (1894). The Court has also approved a practice under which each potential juror, in turn, must be challenged either for cause or peremptorily and, if not excused, sworn before another juror is considered, even though that process limits the defendant's ability to allocate his peremptory challenges among potential jurors. *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894).

The Court has also held that the Constitution prohibits defendants from exercising peremptory challenges based on race, ethnicity, or gender. *J.E.B.*, *supra*; *McCollum*, *supra*; *Hernandez* v. *New York*, 500 U.S. 352 (1991). The purportedly erroneous denial of petitioner's peremptory challenge resulted from the trial court's effort to comply with that constitutional mandate. J.A. 136-137 (finding gender discrimination).[1] Good-

[1] The Supreme Court of Illinois declined to consider the trial judge's finding of gender discrimination because the state supreme court found that no prima facie case of discrimination existed, and thus petitioner should not have been required to explain his strike. J.A. 145-158. But this Court has stated that, once a party has advanced a race-neutral explanation for his challenge, and "the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of

faith errors are an unavoidable consequence of the constitutional prohibition on unlawful discrimination, and they do not render the trial fundamentally unfair.

Because the denial of a state criminal defendant's peremptory challenge deprives him only of state-law rights, whether that error requires automatic reversal, or is instead reviewed for harmlessness, is a question of state law. *Chapman* v. *California*, 386 U.S. 18, 20-21 (1967). And, when "state standards alone have been violated, the State is free, without review by [this Court], to apply its own harmless-error rule to such errors of state law." *Cooper*, 386 U.S. at 62. The trial court's rejection of petitioner's peremptory challenge violated only his state-law rights, so the applicability of harmless-error review was a state-law question for resolution by the state courts.[2] The Supreme Court of Illi-

whether the [party challenging the strike] had a made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359 (plurality opinion). And, in light of the deferential standard of review that applies to trial court findings of intentional discrimination, *id.* at 364-365, and petitioner's admission that his strike against Gomez was based on "the fact that the jury [was] predominantly women" and that he was "trying to also get some impact from possibly other men," J.A. 39, the trial court's disallowance of the strike as based on "gender," J.A. 137, was fully justified.

[2] The deprivation of petitioner's state-law right resulted from the trial court's purported misapplication of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). But that does not mean that federal law governs the harmless-error analysis of the loss of petitioner's peremptory challenge. *Chapman* makes clear that federal harmless-error standards govern only when the defendant has been deprived of a federal right, which did not occur here. See 386 U.S. at 21 (explaining that the harmless-error standard was a question of federal law because the defendant "suffered * * * a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments" of the federal Constitution, and "[w]hether a conviction for a crime should stand when a State has failed to accord

nois held that reversal of petitioner's conviction was not required, whether or not the denial of his peremptory challenge also violated the Constitution, because the error was harmless beyond a reasonable doubt. J.A. 171. The state court thus implicitly held that state law does not require automatic reversal for the erroneous denial of the challenge. This Court should not revisit that state-law ruling.

B. Petitioner's Arguments That The Erroneous Denial Of His Peremptory Challenge Violated Due Process Are Unpersuasive

Petitioner advances three theories to support his claim that the erroneous denial of his peremptory challenge violated the Due Process Clause. None withstands analysis.

1. Due process is not violated merely because an error in jury selection affected the jury's composition

Petitioner first contends that any proceeding before a tribunal that includes someone who lacks "lawful authority" to participate violates due process and that Gomez was an "unlawful" juror because petitioner had exercised a peremptory challenge against her. Br. 19-20. Petitioner is wrong on both counts.

This Court has never held that a proceeding before a tribunal that includes an unauthorized member necessarily violates due process. None of the three cases that petitioner cites to support that contention rests on constitutional grounds. Two involved judges who participated in appeals of cases in which they had participated at the trial level. The Court held that their participation

federal constitutionally guaranteed rights is * * * a federal question").

in the appeals violated a federal statute. *William Cramp & Sons Ship & Engine Bldg. Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645, 649-652 (1913); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 387-388 (1893). The third case, *Gomez* v. *United States*, 490 U.S. 858 (1989), held that the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, does not authorize a magistrate judge to preside over voir dire in a felony trial without the parties' consent.

The cases involving unlawfully constituted judicial tribunals that petitioner cites elsewhere in his brief also all rest on statutory grounds. Br. 14 (citing *Nguyen* v. *United States*, 539 U.S. 69 (2003) (non-Article III judge sat on appeal in a criminal case in contravention of statutory requirements); *Wingo* v. *Wedding*, 418 U.S. 461 (1974) (magistrate lacked authority under Federal Magistrates Act to conduct evidentiary hearing in habeas corpus proceeding); *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (retired appellate judge ineligible by statute to participate in en banc proceedings); *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947) (suit to enjoin enforcement of Interstate Commerce Commission order heard by only two judges, in violation of statutory requirement that three judges hear such cases); *Moran* v. *Dillingham*, 174 U.S. 153 (1899) (judge prohibited by statute from sitting on appellate panel because he handled case at trial level).

These cases establish that, when a judge or judicial tribunal in a federal proceeding lacks authority under federal law to preside, the resulting judgment is "unlawful, and perhaps absolutely void," as matter of federal law. *American Constr. Co.*, 148 U.S. at 387. But the cases do not address *due process*, much less establish that due process is violated whenever a tribunal in

a *state* proceeding includes a member who lacks authority to participate under *state* law.

In any event, Gomez did not lack "lawful authority" to serve on petitioner's jury. Petitioner has never suggested that Gomez failed to meet the statutory requirements for juror service under Illinois law or that she was excludable for cause, and the trial judge found that she was qualified to sit. Petitioner cites no Illinois law to support his claim that his strike "voided" Gomez as a juror even though the trial court rejected his challenge. Br. 19. Nor does he identify any Illinois law suggesting that her participation deprived the jury as a whole of its authority to decide his case.

Petitioner's argument thus reduces to a contention that any error in the jury-selection process violates due process if the error affects the composition of the jury. That contention, however, cannot be reconciled with the holding in *Ross* that the erroneous denial of the defendant's for-cause challenge did not result in a constitutional violation even though it "may have resulted in a jury panel different from that which would otherwise have decided the case." 487 U.S. at 87.

Petitioner's proposed rule would inappropriately constitutionalize state jury-selection rules. States impose numerous requirements on eligibility for jury service, many of which are not related to ensuring an impartial jury. See, *e.g.*, Mo. Ann. Stat. § 494.425(1) (West Supp. 2008) (juror must be at least 21 years old); Ala. Code § 12-16-60(a)(1) (2005) (juror must have resided within county for more than 12 months); W. Va. Code § 52-1-8(b)(4) (2008) (juror may not have been reimbursed for serving on a jury within the past two years). Petitioner's proposal would turn violations of all of those state rules into due process matters.

Under petitioner's rule, due process would impose different requirements for jury composition in different parts of the country. Compare 705 Ill. Comp. Stat. 305/2 (West 2007) (juror must be at least 18 years old) with Ala. Code § 12-16-60(a)(1) (2008) (juror must be more than 19 years old) and Mo. Ann. Stat. § 494.425 (West Supp. 2008) (juror must be at least 21 years old); compare also 705 Ill. Comp. Stat. 305/2 (West 2007) (juror must reside in county but no minimum length of residency required) with Wyo. Stat. Ann. § 1-11-101(a)(i) (2007) (juror must have resided in county for 90 days) and Ala. Code § 12-16-60(a)(1) (2005) (juror must have resided in county for more than 12 months). That result cannot be squared with this Court's repeated statements that the requirements of due process "do not depend upon or vary with local legislation." *Bute* v. *Illinois*, 333 U.S. 640, 648 (1948) (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 317 (1926)); cf. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1607 (2008) (state restrictions on arrest do not cause Fourth Amendment protections "to vary from place to place and time to time" (internal quotation marks and citation omitted)).

The constitutionalization of state jury-selection requirements would also unsettle the traditional allocation of authority between the States and the federal government. This Court has repeatedly held that the States lack authority to expand or contract federal constitutional protections. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). But that is precisely what constitutionalizing state limitations on jury service would permit States to do. Constitutionalizing state requirements for jury service would also conflict with the principle that States are generally free to determine the remedies for violations

of their own laws. See *Moore*, 128 S. Ct. at 1606; p. 13, *supra*. Turning violations of state jury-selection rules into due process violations would infringe on that freedom by federalizing harmless-error analysis for violations of the state rules.

2. Seating a juror whom the defendant has peremptorily challenged does not create an unacceptable risk of bias

Petitioner also contends (Br. 26-37) that mistakenly seating a juror against whom the defendant has exercised a lawful peremptory challenge creates an unacceptable risk of bias and thus violates due process. That contention is incorrect.

Accepting petitioner's contention would circumvent the principle that peremptory challenges "may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *McCollum*, 505 U.S. at 57. Based on that principle, the Court, in both *Ross* and *Martinez-Salazar*, "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88; see *Martinez-Salazar*, 528 U.S. at 313.

The erroneous seating of a juror whom the defendant has peremptorily challenged differs from the situations in *Ross* and *Martinez-Salazar* in only two respects, neither of which supports petitioner's argument. First, unlike the situations in *Ross* and *Martinez-Salazar*, the erroneous seating of a struck juror violates state law. But a violation of state law does not establish an impermissible risk of unfairness, as demonstrated by this Court's cases refusing to equate state-law violations with violations of due process. Second, in the struck

juror situation, unlike in *Ross* and *Martinez-Salazar*, the defendant has identified a particular juror whom he wants excluded. But that fact also does not establish a significant risk of bias. The peremptory is an "arbitrary and capricious species of challenge," 4 William Blackstone, *Commentaries* *346, which a defendant "may exercise * * * without reason or for no reason," *Pointer*, 151 U.S. at 408. A defendant may prefer that a particular juror not serve (or may think another juror better) without any justifiable basis for inferring bias.

Petitioner argues that seating Gomez posed a particular danger of bias because the trial court had "required defense counsel to indicate, in front of Ms. Gomez herself, that he had sufficient concerns about her fairness as a juror to exclude her entirely." Br. 28. That argument is also incorrect.

All defense counsel was required to do in front of Gomez was to ask that she be excused. Counsel explained the reasons for his challenge out of her presence and that of the other jurors. If petitioner believed that announcing challenges to prospective jurors in open court threatened the jury's impartiality, he could have objected to that practice at trial. He did not, and the Court should not consider his belated objection now.

In any event, petitioner's argument lacks merit. He asserts (Br. 35-36) that challenging Gomez in her presence created such a danger of biasing her against him that seating her violated due process and requires automatic reversal of his conviction. If that were correct, then a trial court would be required to excuse any juror whom counsel challenged in open court, regardless of the nature or the validity of the challenge. The mere exercise of the challenge would itself create an impermissible risk of future bias. Thus, even when a defen-

dant's peremptory challenge actually violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the court would have to excuse the challenged juror. In fact, even excusing the juror would not prevent reversal because, according to petitioner (Br. 35), witnessing the challenge would have biased the other jurors. Accepting petitioner's argument would therefore require reversal whenever defense counsel has challenged a juror in open court. That cannot be the law.

3. The erroneous denial of petitioner's peremptory challenge did not violate procedural due process

Relying on cases like *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), petitioner also argues (Br. 37-39) that the denial of his peremptory challenge violated due process by depriving him of a protected liberty interest without appropriate procedural safeguards. That argument is mistaken.

a. State law may sometimes create a liberty interest protected by the Due Process Clause. *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005). But state rules of criminal procedure do not ordinarily create protected liberty interests. A criminal defendant has a constitutionally protected liberty interest that the criminal prosecution, as a whole, seeks to overcome by convicting him of a crime. The specific procedural mechanisms that States provide to determine guilt or innocence do not give rise to additional, separate liberty interests. If they did, then little would remain of the rule that violations of state-created trial rights provide no basis for federal habeas corpus relief. See p. 10, *supra*. Thus, petitioner is incorrect (Br. 37) in grounding his asserted liberty interest in expectations created by Illinois peremptory challenge law.

b. When a criminal defendant complains that the violation of a state-created procedural right deprived him of due process, the appropriate inquiry is not the analysis used in civil cases like *Logan*. In *Medina* v. *California*, 505 U.S. 437 (1992), this Court explained that the procedural due process analysis that applies in the civil context "does not provide the appropriate framework for assessing" challenges involving "state procedural rules which * * * are part of the criminal process." *Id.* at 443. The Court noted that "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Ibid.*

Instead, when a defendant claims that a violation of a state criminal procedural rule violates due process, the inquiry is the one traditionally used in the criminal context—whether the violation results in prejudice so great as to deny the defendant his right to a fair trial. *Estelle*, 502 U.S. at 75; *Lane*, 474 U.S. at 446 n.8. As described above, the denial of a state-created right to a peremptory challenge does not result in that kind of unfairness. See pp. 10-13, *supra*.

c. Even assuming that the *Logan* analysis applies to the denial of petitioner's peremptory challenge, the question is whether petitioner had a meaningful opportunity to be heard. *Logan*, 455 U.S. at 433. Here, petitioner received more than adequate procedural protections. He had a full opportunity to be heard before the trial court denied the challenge. As contemplated by *Batson*, the court questioned petitioner's counsel about

the reasons for the challenge. The court gave counsel ample opportunity to justify the strike, requesting an initial explanation and allowing counsel to make further comment after the court announced its tentative decision. The court even permitted counsel to question Gomez further in an effort to support his proffered race-neutral justification. Petitioner also received extensive post-deprivation process. He appealed the denial of the peremptory challenge to the Appellate Court of Illinois and then to the Supreme Court of Illinois, both of which gave careful attention to his claim.

d. The criminal cases that petitioner cites (Br. 37-38) do not support his procedural due process claim. *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), held that the imposition of a sentence by a jury that was not informed of its discretion to impose a lesser punishment deprived the defendant of due process. That error deprived the defendant of any substantive determination of the appropriate punishment for his crime, and the error prejudiced him because of the "substantial" possibility that a properly instructed jury would have imposed a lower sentence. *Id.* at 346-347. Here, in contrast, the denial of petitioner's peremptory challenge did not deprive him of sentencing discretion or any other substantive determination accorded by law. A fair and impartial jury was correctly instructed on its legal options. And, unlike in *Hicks*, where the defendant was prejudiced by the error, in this case, the state supreme court determined that the error did not affect the outcome of petitioner's trial.

Douglas v. *California*, 372 U.S. 353 (1963), and *Evitts* v. *Lucey*, 469 U.S. 387 (1985), likewise do not assist petitioner. *Douglas* held that the "equality demanded by the Fourteenth Amendment" guarantees an indigent criminal defendant the right to counsel when

the State affords defendants an appeal of right. 372 U.S. at 358. Because "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal * * * would be a futile gesture unless it comprehended the right to the effective assistance of counsel," *Evitts* held that due process guarantees the right to effective assistance. 469 U.S. at 397. *Douglas* and *Evitts* thus turned in significant part on the constitutional right to equal protection, which is not implicated here.

C. Even If The Erroneous Denial Of A Peremptory Challenge Violated Due Process, The Error Would Be Subject To Harmless-Error Review

Since *Chapman*, it has been clear that "most constitutional errors can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Harmless-error analysis applies, for example, to improper comments on the defendant's failure to testify (*Chapman*, *supra*), admission of a coerced confession (*Arizona* v. *Fulminante*, 499 U.S. 279 (1991)), and the failure to submit an element of the offense to the jury (*Neder*, *supra*).

The Court has found only a handful of "fundamental" errors that require reversal regardless of their effect on the outcome of the trial. *Neder*, 527 U.S. at 7. It has described those errors as "structural," *Fulminante*, 499 U.S. at 309, explaining that they deprive the defendant of "basic protections," *Clark*, 478 U.S. at 577, and generally "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993). See *Neder*, 527 U.S. at 9

(structural errors "*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence"). Structural errors include denial of counsel of choice (*United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006)); giving a deficient reasonable-doubt instruction (*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993)); racial discrimination in selecting the grand jury (*Vasquez* v. *Hillery*, 474 U.S. 254 (1986)); denial of a public trial (*Waller* v. *Georgia*, 467 U.S. 39 (1984)); denial of self-representation at trial (*McKaskle* v. *Wiggins*, 465 U.S. 168 (1984)); complete denial of counsel (*Gidzon* v. *Wainwright*, 372 U.S. 335 (1963)); adjudication by a biased judge (*Tumey* v. *Ohio*, 273 U.S. 510 (1927)); and seating an actually biased juror (*Martinez-Salazar*, 528 U.S. at 316).

The erroneous denial of a single peremptory challenge differs significantly from those structural errors. It does not infringe a "basic protection[]" required in every criminal trial, *Clark*, 478 U.S. at 577, because the Constitution leaves the decision whether to provide peremptory challenges entirely within the State's control. See *Stilson*, 250 U.S. at 586. It also does not render the trial fundamentally unfair or unreliable, because, when no biased juror sits, loss of a peremptory challenge does not deprive the defendant of an impartial jury. *Ross*, 487 U.S. at 88. Nor does the error "infect the entire trial process." *Brecht*, 507 U.S. at 630. It has no effect on the trial record, the legal arguments presented, or the way the case is submitted to the jury. The defendant continues to enjoy counsel, an unbiased jury, and all other protections provided by the Constitution and procedural rules.

Retrials impose significant costs on society, witnesses, and victims. And "[p]assage of time, erosion of

memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle*, 456 U.S. at 127-128. Those costs are an "acceptable and often necessary consequence" when an error "has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

The costs of requiring automatic reversal for erroneous denials of peremptory challenges would be particularly high. Jury selection is often fast-paced and conducted under pressure. A trial judge has complex responsibilities: to ensure that parties have an adequate basis for making challenges, that claims of error (including allegations of discrimination in the use of peremptory challenges) are adjudicated promptly and fairly, and that impartial jurors are empaneled Experience shows that, despite the diligence of trial judges, jury selection may produce a significant number of errors that, in retrospect, impair or deny defendants' peremptory challenges.

Given that reality, automatic reversal is too high a price to pay to correct an error that, at most, deprives the defendant of the right to exclude a juror whom he believes may be less favorable to him than some other juror. See *United States* v. *Underwood*, 130 F.3d 1225, 1230 (7th Cir. 1997) (Easterbrook, J., dissenting from denial of reh'g en banc), cert. denied, 524 U.S. 937 (1998).

An automatic-reversal rule could lead courts to be less vigilant in enforcing *Batson* challenges for fear that good-faith errors will necessitate costly retrials. And it could lead "federal and state legislators to cut down the

number of peremptories or eliminate them altogether." *United States* v. *Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1995) (en banc) (Kozinski, J., dissenting). This Court should not risk those undesirable results.

Instead, the Court should apply harmless-error analysis to erroneous denials of peremptory challenges. The fundamental purpose of peremptory challenges is to assist in the selection of an impartial jury. *J.E.B.*, 511 U.S. at 137 n.8; *Frazier*, 335 U.S. at 505. The jury that sat in this case was fair and impartial. It unanimously found that petitioner was guilty. It would be pure speculation to conclude that the substitution of a different impartial juror for one of those twelve impartial jurors would have changed the jury's verdict. Thus, because the erroneous denial of petitioner's peremptory challenge did not result in the seating of a biased juror, the error was harmless. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-556 (1984) (*McDonough*) (Even if a juror's failure to respond correctly to a question on voir dire deprives a party of information that would have led the party to exercise a peremptory challenge, the error does not require reversal unless a correct response "would have provided a valid basis for a challenge for cause.").

A finding of harmlessness is warranted here for an additional reason. As the Supreme Court of Illinois explained, the evidence against petitioner was so overwhelming that no rational jury could have acquitted him. J.A. 171. Gomez's presence on the jury therefore could not have prejudiced petitioner, because any rational juror serving in Gomez's stead would have been required to find him guilty. J.A. 166, 171. Given the overwhelming evidence, the substitution of a different juror could only have affected the outcome if that juror had voted to

acquit despite the overwhelming evidence of guilt. But a criminal defendant has no right to jury nullification, which this Court has repeatedly described as jurors' "assumption of a power which they had no right to exercise." *Standefer* v. *United States*, 447 U.S. 10, 22 (1980) (citation omitted); see *Sparf* v. *United States*, 156 U.S. 51, 102-106 (1895).

C. Petitioner's Arguments For Automatic Reversal Are Unpersuasive

1. Automatic reversal is not required whenever an error affects the composition of the tribunal

Petitioner contends (Br. 13-20) that any error affecting the composition of the tribunal always requires reversal without inquiry into prejudice. That contention is supported by neither precedent nor policy.

None of the cases cited by petitioner adopts the broad rule he espouses. Most of the jury cases involve the unlawful exclusion of jurors based on race or membership in an identifiable group. See *Powers* v. *Ohio*, 499 U.S. 400 (1991) (race); *Batson*, *supra* (race); *Vasquez*, *supra* (race); *Peters* v. *Kiff*, 407 U.S. 493 (1972) (race); *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217 (1946) (daily wage earners). Automatic reversal applies in that context because "discrimination in the selection of jurors harms not only the accused" but also the excluded jurors and the entire community. *Batson*, 476 U.S. at 87. Unlawful discrimination "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law" and impugns "the integrity of the judicial process." *Powers*, 499 U.S. at 411-412 (citation omitted). Similarly, the systematic exclusion of "persons of low economic and social status" suggests that the jury is "the instrument of the economically and socially privi-

leged" and "undermine[s] and weaken[s] the institution of jury trial." *Thiel*, 328 U.S. at 223-224. Those considerations do not apply to an erroneous denial of a peremptory challenge that does not result in the seating of a biased juror.

Another group of petitioner's cases involves juries or presiding judges who were not impartial. See *Gray* v. *Mississippi*, 481 U.S. 648, 667 (1987) (jury "deliberately tipped towards death" by erroneous exclusion of juror who opposed death penalty but could fairly apply law) (citation omitted); *Irvin* v. *Dowd*, 366 U.S. 717 (1961) (two-thirds of jury had decided defendant was guilty before trial); *In re Murchison*, 349 U.S. 133 (1955) (judge presiding over trial had interest in outcome); *Tumey*, *supra* (same). Those cases have no bearing here because petitioner has not shown that any of the jurors was biased.

The final group of cases involves judges or judicial tribunals that lacked statutory authority to preside. See pp. 14-16, *supra*. In a number of such cases, this Court has concluded that, when the presiding judge or judges in a federal proceeding lack statutory authority, the resulting judgment is unlawful under federal law. The Court has required automatic reversal as an exercise of its supervisory authority over the federal courts. *Nguyen*, 539 U.S. at 74, 81. The erroneous denial of the peremptory challenge in this case did not result in an adjudicator who lacked statutory authority to preside under either federal or Illinois law. Nor does this Court have supervisory authority over the Illinois courts. *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982). Accordingly,

the cases cited by petitioner do not support automatic reversal of his conviction.[3]

Indeed, a rule requiring automatic reversal whenever an error affects the composition of the tribunal would conflict with this Court's decisions. It could not be squared with *Ross* and *McDonough*, in which the Court held that errors in the jury-selection process did *not* require reversal even though they may have affected the composition of the jury. See *Ross*, 487 U.S. at 87; *McDonough*, 464 U.S. at 555-556. An automatic-reversal rule also would be inconsistent with *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), which involved a violation of 28 U.S.C. 455(a), a statute providing that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Although this Court affirmed reversal of the judgment under Federal Rule of Civil Procedure 60(b), the Court made clear that "there is surely room for harmless error" when Section 455(a) is violated. *Liljeberg*, 486 U.S. at 862.

Requiring automatic reversal simply because an error affects the composition of the jury would require costly retrials for technical violations of jury-selection rules that did not prejudice the defendant. For example, retrial would be required whenever a juror did not meet

[3] Contrary to petitioner's contention, *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), does not establish that "errors regarding the choice of an individual to prosecute a crime also require automatic reversal." Br. 15. *Young* involved a judicially appointed prosecutor with a private interest in the case. See 481 U.S. at 813-814 (plurality opinion). *Young* is therefore similar to decisions requiring automatic reversal in cases involving a biased adjudicator, and, like those decisions, has no relevance here.

state qualification requirements, no matter how unrelated those requirements were to ensuring a fair trial. See pp. 16-17, *supra*. Retrial also would be required whenever a judge erroneously dismissed a juror in the mistaken belief that he was disqualified for cause; whenever a judge erroneously replaced a regular juror with a fully qualified alternate; or whenever a judge in good faith miscounted the number of peremptory challenges that a defendant had exercised and thereby deprived the defendant of a challenge. The Constitution does not mandate those results.

2. Automatic reversal is not required whenever it is difficult to assess the effect of an error

Petitioner also argues (Br. 20-26) that automatic reversal is required because it is too difficult to determine whether erroneously seating Gomez affected the outcome of the trial. That argument is incorrect.

This Court has sometimes considered the difficulty in assessing harm in determining whether an error requires automatic reversal. See, *e.g.*, *Gonzalez-Lopez*, *supra*; *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). Difficulty in assessing harm does not, however, in itself render an error structural. The Court has applied harmless-error review to numerous errors whose effects are difficult to assess. In particular, the Court has frequently applied harmless-error review to errors that, like the erroneous denial of a peremptory challenge, do not occur during the presentation of the case to the jury. Thus, the Court has found harmless irregularities in grand jury proceedings, *Mechanik*, *supra*; improper joinder of defendants in a single trial, *Lane*, *supra*; deprivation of a defendant's right to be present at all critical stages of the proceedings, and denial of counsel dur-

ing a communication between the trial judge and a juror, *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam). See also *United States* v. *Olano*, 507 U.S. 725 (1993) (presence of alternates in jury room during deliberations did not violate defendant's substantial rights). The Court has also applied harmless-error review to other errors, such as violation of the right against self-incrimination (*Fulminante*, *supra*) and erroneous exclusion of evidence in violation of the Confrontation Clause (*Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)), even though those errors "affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable." *Neder*, 527 U.S. at 18.

The inability to assess harm renders an error structural only if the error denies the defendant a "basic protection[]," *Clark*, 478 U.S. at 577, and "infect[s] the entire trial process," *Brecht*, 507 U.S. at 630. Thus, the denial of counsel of choice in *Gonzalez-Lopez* infringed a right that the Court described as the "root meaning of the constitutional guarantee" of assistance of counsel. 548 U.S. at 147-148. And the Court stressed that "the deprivation of choice of counsel pervades the entire trial;" it may affect investigation and discovery, plea proceedings, the evidence and argument presented to the jury, and the legal arguments presented to the court. *Id.* at 150. The same is true of joint representation of defendants with conflicting interests, the constitutional violation in *Holloway*. 435 U.S. at 489-490.

In contrast, the erroneous denial of a peremptory challenge deprives the defendant of only a "statutory privilege" that the State may withhold entirely without offending the Constitution. *Frazier*, 335 U.S. at 505 n.11. And, far from infecting the entire trial, the error has no effect on investigation and discovery, plea pro-

ceedings, the development of the trial record, or the legal standards to be applied by the judge and jury.

Contrary to petitioner's contention (Br. 22), if it were necessary to look beyond the fact that no biased juror sat, a court could ascertain that the erroneous denial of a peremptory challenge did not affect the trial's outcome. In this case, the evidence was so overwhelming that no rational jury could have reached a different result. J.A. 166-171; see *Neder*, 527 U.S. at 17-18.

Petitioner incorrectly contends that *Neder*'s overwhelming-evidence analysis cannot be applied when it would require "a wholesale evaluation of the entire record to determine whether a reasonable jury could have acquitted [the defendant]." Br. 25. On the contrary, this Court has repeatedly stated that harmless-error analysis "*mandates* consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1982) (emphasis added); *e.g.*, *Brecht*, 507 U.S. at 638; *Van Arsdall*, 475 U.S. at 681. And the Court has relied on overwhelming evidence to find errors harmless even when they could have affected the jury's determination on multiple (or even all) elements of the offense. See, *e.g.*, *Lane*, 474 U.S. at 450; *Hasting*, 461 U.S. at 512; *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

Finally, petitioner mistakenly argues (Br. 25-26) that applying harmless-error review here is inconsistent with *Sullivan* and amounts to a directed verdict. *Sullivan* involved a defective reasonable-doubt instruction that "vitiate[d] *all* of the jury's findings." 508 U.S. at 281. As a consequence, the defendant did not receive a jury finding beyond a reasonable doubt on *any* element of the offense. The Court therefore concluded that "there

ha[d] been no jury verdict within the meaning of the Sixth Amendment," and that affirming the conviction based on harmless-error review would amount to a directed verdict. *Id.* at 280. In contrast, the error in this case did not vitiate *any* of the jury's findings. Petitioner received a determination on *every* element of the offense from a fair and impartial jury that was properly instructed. He cannot credibly contend that he was denied a jury verdict within the meaning of the Sixth Amendment or that applying harmless-error review would be tantamount to a directed verdict.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

RITA M. GLAVIN
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

JANUARY 2009

AMICUS CURIAE BRIEF

No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Whether a state trial court's good faith error in denying a criminal defendant's peremptory challenge requires reversal of a subsequent conviction as a matter of federal law, when that error did not deprive the defendant of a fair trial by an impartial jury or otherwise violate any federally protected right.

2. Whether there is any error at all when the trial judge's *sua sponte McCollum* challenge resulted in a clearly correct finding on the ultimate issue of discrimination.

TABLE OF CONTENTS

Questions presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 7

I

Whether there was any error cognizable on appeal is an issue fairly included in the question presented 7

II

On appeal, after a *Batson* or *McCollum* issue has been heard through all three stages, only the final finding of discrimination should be reviewed 9

A. Origins of the prima facie requirement ... 10

B. The employment cases 11

C. Application to *Batson* 16

III

The type of discrimination established for a prima facie case need not be exactly the same type found in the final ruling 20

A. Orderly presentation of evidence 20

B. Satisfaction of purpose 21

IV

The trial court properly found a prima facie case 23

Conclusion 27

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 3

Arizona v. Hicks, 480 U. S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) 22

Batson v. Kentucky, 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 9, 10, 11, 13, 17, 20, 22, 23, 24

Boehms v. Crowell, 139 F. 3d 452 (CA5 1998) 15

Caspari v. Bohlen, 510 U. S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) 7

Cumpiano v. Banco Santander Puerto Rico, 902 F. 2d 148 (CA1 1990) 15

Furnco Constr. Corp. v. Waters, 438 U. S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) 21

Georgia v. McCollum, 505 U. S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) 9, 24

Hernandez v. New York, 500 U. S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) 8, 9, 16, 17

Hopp v. City of Pittsburgh, 194 F. 3d 434 (CA3 1999) 15

Imwalle v. Reliance Med. Prods., 515 F. 3d 531 (CA6 2008) 16

J. E. B. v. Alabama ex rel. T. B., 511 U. S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) 22

Johnson v. California, 545 U. S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) 17, 18, 24, 26

Jones v. United States, 525 U. S. 809, 119 S. Ct. 39, 142 L. Ed. 2d 31 (1998) 8

Jones v. United States, 527 U. S. 373, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999) 8

McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 11, 12, 13, 20

Mitchell v. Baldrige, 759 F. 2d 80 (CADC 1985) 14, 15

Ohio v. Robinette, 519 U. S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996) 7

People v. Rivera, 221 Ill. 2d 481, 852 N. E. 2d 771 (2006) 2, 3, 4, 9, 16

People v. Rivera, 348 Ill. App. 3d 168, 810 N. E. 2d 129 (2004) 2, 4, 8, 27

Postal Service Bd. of Governors v. Aikens, 460 U. S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) 10, 13, 14, 16

Powers v. Ohio, 499 U. S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991) 23

Rice v. Collins, 546 U. S. 333, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) 21, 22

St. Mary's Honor Center v. Hicks, 509 U. S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) 14

State v. Evans, 100 Wash. App. 757, 998 P. 2d 373 (2000) 19

Tolbert v. Page, 182 F. 3d 677 (CA9 1999) 24

United States v. Stewart, 65 F. 3d 918 (CA11 1995) 17, 18, 19

United States v. X-Citement Video, Inc., 513 U. S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) 8

Rule of Court

Supreme Court Rule 14.1(a) 7

Secondary Sources

4 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure (3d ed. 2007) 16

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

---

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

Batson v. *Kentucky* established a three-step procedure to determine whether a peremptory strike had been exercised in a discriminatory manner. Its intent was to reduce suspicions that discrimination had infected the jury process. Adherence to *Batson*'s procedure is important, but this process was never intended to be so rigid that a simple misstep would overturn a valid conviction. However, such reversals will occur under the precedent set by the Illinois Supreme Court in this case unless the error is corrected. That precedent would limit the ability of a trial judge to protect jurors from courtroom discrimination. Both results are contrary to the interests of the rights of society and victims which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Michael Rivera was the "chief enforcer" of the "Insane Deuces" street gang in Chicago. *People* v. *Rivera*, 348 Ill. App. 3d 168, 170, 810 N. E. 2d 129, 131 (2004). On the morning of January 10, 1998, Rivera saw Marcus Lee, a young African-American male, walking along the street and mistakenly believed him to be a member of a rival gang. Brief for Respondent 1. Rivera shot Marcus in the back of the head and bragged about it afterward. *Ibid*. Rivera was convicted of two counts of first-degree murder and was sentenced to 85 years in prison. *People* v. *Rivera*, 221 Ill. 2d 481, 483, 852 N. E. 2d 771, 773 (2006) ("Rivera II").

In his appeals, Rivera has never contested the sufficiency of the evidence supporting his conviction. *People* v. *Rivera*, 348 Ill. App. 3d, at 170, 810 N. E. 2d, at 131. Instead, Rivera has challenged the trial judge's decision to deny him the use of a peremptory strike. *Ibid*. He also raised an *Apprendi* issue that is not

before this Court. See *id.*, at 179, 810 N. E. 2d, at 138; *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000).

During jury selection, Rivera sought to use his fourth peremptory strike to remove Mrs. Deloris Gomez from the jury. J. A. 147. Mrs. Gomez was a business officer in the outpatient orthopedic clinic at Cook County Hospital. *Ibid.* Defense counsel questioned Mrs. Gomez about her work at the clinic in order to determine whether her limited exposure to gunshot victims might affect her ability to act as a fair juror in Rivera's case. *Ibid.* Mrs. Gomez stated it would not, yet defense counsel sought to strike Mrs. Gomez from the jury. *Ibid.*

The trial judge promptly held a conference in chambers so that defense counsel could explain his reasons for the strike. *Ibid.* The trial judge believed duty required him to raise the question *sua sponte* because defense counsel was discriminating against Mrs. Gomez. *Ibid.* The trial judge did not find defense counsel's explanation credible, overruled the strike, and seated Mrs. Gomez on the panel. J. A. 148-149.

While still in chambers, defense counsel requested leave to conduct additional questioning of Mrs. Gomez. J. A. 149. Throughout the questioning, Mrs. Gomez maintained that her work would not affect her judgment. She also noted that the outpatient clinic where she works is not in the same location as the emergency room where gunshot victims would receive their initial treatment. J. A. 36-38. Defense counsel was not satisfied by her responses. He still wished to strike Mrs. Gomez. J. A. 39. In chambers and on the record, defense counsel further explained his reasons for the strike. *Ibid.* He claimed he was "trying to get some impact from possibly other men in the case." *Ibid.* He was "trying to modify the composition of this panel. I'm not trying to exclude a woman because of her race, but

strike that[,] not trying to excuse a juror because of her race." *Ibid.*

On appeal, Rivera argued that the trial court had erred when it raised a reverse-*Batson* challenge *sua sponte*. *Rivera*, 348 Ill. App. 3d, at 169, 810 N. E. 2d, at 131. The Illinois Appellate Court rejected his argument and affirmed Rivera's conviction and sentence. *Id.*, at 177, 810 N. E. 2d, at 138. The Illinois Supreme Court reviewed the case and remanded it "for a limited hearing to allow the trial judge an opportunity to articulate the bases for his *Batson* rulings." *Rivera II*, 221 Ill. 2d, at 515-516, 852 N. E. 2d, at 791-792. In November 2006, six years after defendant's trial, the now-retired trial judge testified that he believed the defense was engaging in gender discrimination. J. A. 136. To lead into his discussion of gender discrimination, the trial judge made statements reflecting his additional concern of racial discrimination. J. A. 135. He stated that the murder victim "was an African-American male," his mother "was also African-American," and Mrs. Gomez was "another female African-American"—the second the defense had sought to excuse. *Ibid.*

In its final review of Rivera's claim, the Illinois Supreme Court examined the entire record, including the trial judge's testimony, and found it insufficient "to support a prima facie case of discrimination *of any kind.*" J. A. 157. Its conclusion was based on state precedent that "the mere number of persons in a protected class who are peremptorily challenged, without more, will not establish a prima facie case of discrimination." J. A. 156. The court found it was the challenger's burden to provide more information on the characteristics of the venire, the characteristics of the others struck, and the answers of those not struck, before it could conclude a prima facie case had been

made. *Ibid.* Since the State and the trial court had failed to provide more information, the Illinois Supreme Court concluded the record did not support the action of the trial court. *Ibid.* The court concluded Mrs. Gomez should not have been seated on the jury. J. A. 157-158.

The court then went on to examine whether reversal was required, or if the error was harmless. J. A. 158. The court concluded that the harmless error test could be applied to denial of a peremptory challenge. See J. A. 168. The court assessed the harm caused by placing Mrs. Gomez on the jury by applying the reasonable juror standard. *Ibid.* If the evidence was so overwhelming that no rational juror would have acquitted Rivera, then Mrs. Gomez's presence on the jury was harmless. *Ibid.* Concluding that the evidence was so overwhelming that "any rational trier of fact would have found the defendant guilty of murder . . . ," J. A. 171, the court found denying Rivera's peremptory challenge had been harmless error. It then affirmed the judgment of the Illinois Appellate Court. J. A. 176.

This Court granted certiorari on October 1, 2008.

SUMMARY OF ARGUMENT

Rivera asks this Court to determine whether harmless error analysis should have been applied to the trial court's *Batson* challenge. The question assumes the Illinois Supreme Court correctly found error. This assumption is incorrect. As Respondent and *amicus* have stated, there was no error in Rivera's case. Resolution of whether the state court's finding of error was correct is a "necessary predicate" to the harmless error question under *Caspari* v. *Bohlen*.

When a defendant challenges the trial court's decision to overrule his use of a peremptory strike, the reviewing court's inquiry is fairly limited. The three preliminary steps laid out in *Batson* allow the trial court to establish an orderly record for review. Once the record reaches an appellate court, all that is left to decide is whether with the trial court's finding of discrimination is fairly supported. In appellate practice, the importance of the *Batson*'s first preliminary step has been clearly articulated in *Hernandez* v. *New York*. *Hernandez* established that once a trial court has ruled on the ultimate issue of discrimination, any preliminary issues concerning the prima facie case are moot. Simply put, a trial judge's finding of discrimination after full inquiry removed the need to go back and look at why discrimination was suspected.

Batson adopted its three-step procedure from cases discussing employment discrimination under Title VII of the Civil Rights Act of 1964. It is to those cases that courts should look for guidance. In Title VII cases, this Court has adopted the rule that a finding of discrimination renders review of the prima facie case irrelevant, and the Courts of Appeals have applied this rule uniformly to both plaintiff-appellants and defendant-appellants. The same universal adoption has not occurred for *Batson* challenges. In *Batson* cases, some lower courts, including the Illinois Supreme Court, have concluded that after a discrimination claim has been tried on the merits, appellate courts have the authority to re-examine the prima facie case. Such action contradicts *Batson*'s origins and is contrary to the policy expressed in *Johnson* v. *California*.

Furthermore, even if the Illinois Supreme Court correctly re-examined the trial court's prima facie case, it incorrectly found there was no evidence of discrimination. The record shows that Rivera was on trial for

the murder of an African-American man, and that out of four peremptory strikes, three were used against women, two of whom were African-American women. This provided sufficient justification for the trial court to inquire into defense's motives for the strikes. Upon inquiry, defense counsel admitted he was striking an African-American woman so he might place more men on the jury. His express admission confirms the trial judge's decision to inquire into his motives. Without the judge's inquiry, discrimination would not have been uncovered, and *Batson*'s intention of eliminating discrimination from the trial process would not have been served.

ARGUMENT

I. Whether there was any error cognizable on appeal is an issue fairly included in the question presented.

The question as framed by petitioner assumes that the trial court committed error when it denied defense counsel's peremptory strike. Respondent State of Illinois has consistently maintained, in the state courts and in its Brief in Opposition in this Court, that there was no error.

This question is a "subsidiary question fairly included in the question presented." *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994); Supreme Court Rule 14.1(a). It is " 'predicate to an intelligent resolution' of the question presented," *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted), because the question of whether an error was harmless makes no sense if there was no error. Just as the appellate court found no error because "the trial court could rationally find a motive to discriminate against African-Ameri-

cans, women, or both groups simultaneously," *People* v. *Rivera*, 348 Ill. App. 3d 168, 179, 810 N. E. 2d 129, 138 (2004), and did not address the harmless error issue, this Court may resolve this case on the grounds that a correct finding of discrimination in a defense peremptory challenge precludes reversal based on second-guessing a preliminary step.

Jones v. *United States*, 527 U. S. 373 (1999), is on point. The Court granted certiorari on the question of "[w]hether . . . the submission of invalid nonstatutory aggravating factors was harmless" in a capital case. See *Jones* v. *United States*, 525 U. S. 809 (1998). The plurality opinion held that the question of whether the factors were invalid was fairly included. See 527 U. S., at 396-397.

Moreover, this question is properly before this Court because a "prevailing party, without cross-petitioning, is 'entitled under our precedents to urge any grounds which would lend support to the judgment below.' " *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994). This includes an argument rejected by the court below, so long as the argument would support the judgment. See *id.*, at 78-79. Illinois has consistently maintained that the trial judge did not err. The State argued it in the courts below, the argument was accepted in the Illinois Appellate Court, *People* v. *Rivera*, 348 Ill. App. 3d, at 179, 810 N. E. 2d, at 138, and it has been preserved in the Brief in Opposition. See Brief in Opposition 26-29. The point is also made in the merits brief, albeit fleetingly. See Brief for Respondent 43, and n. 3.

The relevance of the mootness language in *Hernandez* v. *New York*, 500 U. S. 352 (1991), to reverse-*Batson* challenges has been litigated throughout Rivera's appeals. Fairly included in the question presented is whether *Hernandez*'s adoption of the Title VII line of

cases is applicable here. Addressing the threshold question of whether the issue of a prima facie case becomes moot after the trial judge has found discrimination is necessary to full resolution of this case.

II. On appeal, after a *Batson* or *McCollum* issue has been heard through all three stages, only the final finding of discrimination should be reviewed.

From the beginning, the three-step procedure laid out in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), has been equivalent to the procedure used in employment discrimination cases.

> "We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that '[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.' *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983). The same principle applies under *Batson*. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez* v. *New York*, 500 U. S. 352, 359 (1991) (plurality opinion).

The Illinois Supreme Court erred when it believed the *Hernandez* reasoning did not apply to "reverse-*Batson*" challenges under *Georgia* v. *McCollum*, 505 U. S. 42 (1992). See *Rivera II*, 221 Ill. 2d, at 507, 852 N. E. 2d, at 786-787.

A. Origins of the Prima Facie Requirement.

The three-step procedure adopted in *Batson* did not originate in criminal cases. Instead, the *Batson* Court expressly adopted the "prima facie burden of proof rules" from a trio of employment cases. 476 U. S., at 94, n. 18. These rules place the ultimate burden of persuasion on the party claiming to be the victim of intentional discrimination, *ibid.*, so once the court has ruled that the party has, or has not, met his burden, the inquiry into discrimination has reached its logical end. At all times throughout the process, the "ultimate issue is whether the State has discriminated," *id.*, at 95, and *Batson*'s methods explaining how a defendant "may make out a prima facie case," *id.*, at 96, n. 19, should not distract from the importance of deciding the ultimate issue. The three-step method "was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.' " *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983) (quoting *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978)).

Batson's adoption of a three-step procedure was not meant to guarantee jury impartiality; it was adopted to review claims of racial discrimination. The claimant's burden to establish a prima facie case of discrimination in the first step of *Batson* review is not, therefore, part of a constitutional right to impartiality. This requirement is supposed to be one step in a method designed to review discriminatory conduct. Once a court rules on the ultimate issue of discrimination, it is not strict adherence to the methods endorsed by *Batson* that is important. The final determination carries the ultimate weight.

Nowhere is this clearer than the issue this Court chose to examine in *Batson*. The *Batson* case "concern-[ed] the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Batson*, 476 U. S., at 82. To examine the defendant's evidentiary burden, and establish a framework for the parties to follow, the Supreme Court turned to cases that addressed discrimination in other contexts, such as employment and selection of the venire. The latter helped establish the context for the *Batson* decision; the former provided the framework that is at issue today.

B. The Employment Cases.

McDonnell Douglas Corp. v. *Green*, 411 U. S. 792 (1973), is the first decision *Batson* cites to "explain[] the operation of prima facie burden of proof rules." *Batson*, 476 U. S., at 94, n. 18. *McDonnell Douglas* was an early ruling discussing the burdens, order, and nature of proof in proving a Title VII claim. *Batson*'s matter-of-fact adoption of the *McDonnell Douglas* framework from the employment cases without extended discussion negates the notion that the three-step procedure was based on any considerations unique to peremptory challenges.

In his Title VII claim, Green had filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) alleging that McDonnell Douglas's hiring practices violated provisions of the Civil Rights Act of 1964. *McDonnell*, 411 U. S., at 796. The EEOC made no finding on whether McDonnell Douglas had engaged in a discriminatory hiring process, but did find that McDonnell Douglas had improperly failed to rehire Green because of some of his civil rights activities. *Id.*, at 797. The EEOC finding permitted Green to file suit

in federal court. *Ibid.* The District Court then dismissed Green's claim of racial discrimination in the hiring procedures because the EEOC had failed to make a determination of reasonable cause on this claim. *Ibid.* The Court of Appeals reversed, finding that an EEOC determination was not a jurisdictional prerequisite to raising a Title VII claim in federal court. The case was remanded for trial with standards regarding burdens of proof. *Id.*, at 798. The Court of Appeals standards noted that Green had established a prima facie case of racial discrimination, that McDonnell Douglas's explanation was "subjective" and "carried little weight in rebutting charges of discrimination," but that Green should be given the opportunity to demonstrate that McDonnell Douglas's refusal to rehire him was based on mere pretext. *Ibid.*

This Court affirmed the Court of Appeals finding of federal jurisdiction and remanded the case for trial on Green's claim of racial discrimination, but it did so with its own instructions. *Id.*, at 798-800. According to this Court, the Court of Appeals had attempted, through two unsuccessful and incompatible opinions, "to state applicable rules as to the burden of proof and how this shifts upon the making of a prima facie case." *Id.*, at 801 (footnote omitted). To remedy the problem, the Supreme Court established the three-part procedure that is at issue in the present case. *Id.*, at 802-804. From *McDonnell Douglas* forward, a complainant is charged with the burden of establishing a prima facie case of discrimination. *Id.*, at 802. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* McDonnell Douglas's reason was found sufficient "to meet the prima facie case," but it was insufficient to end the inquiry. *Id.*, at 804. An ultimate decision on discrimination could not be found until Green had been afforded the opportunity to prove

the explanation was a pretext. *Ibid.* Only then could the District Court "order a prompt and appropriate remedy." *Id.*, at 807.

The burden-shifting procedure originally adopted for Title VII cases became a part of the criminal trial process 13 years later. See *Batson*, 476 U. S., at 94, n. 18. Now, when an appellate court finds itself questioning the trial court's application of the burden-shifting structure, the appellate court should be informed by *McDonnell Douglas* and its progeny as well as *Batson* and its progeny. *Batson* informs us that the *McDonnell Douglas* procedure applies, but it does not give a court much insight on how an appellate court reviews the process. In a case like the present one, where the defendant is claiming the trial court's *sua sponte* action was incompatible with the *Batson* framework, J. A. 145, there is no clear *Batson* answer. We can therefore turn to the Title VII cases for guidance.

Between *McDonnell Douglas* and *Batson*, this Court addressed the effect that the prima facie case step has on appeal after the trial court had made the ultimate finding of discrimination. The answer is, in effect, "not much." See *Aikens*, 460 U. S., at 714-715.

Aikens had filed a Title VII claim against the U. S. Postal Service, claiming racial discrimination. *Id.*, at 712. The trial court had found in favor of the Postal Service, but the Court of Appeals reversed. *Id.*, at 713. On remand from the Supreme Court, the Court of Appeals reaffirmed its earlier holding. It found error because the District Court had required Aikens to offer direct proof of discriminatory intent and required Aikens to prove "as part of his prima facie case, that he was 'as qualified or more qualified' than the people who were promoted." *Ibid.*

When arguing their case before this Court, both parties framed the issue in terms of whether Aikens had adequately established a prima facie case of discrimination. The Postal Service claimed Aikens had not, and Aikens claimed he had. See *ibid.* The Court found such arguments "surprising," because when a case has been "fully tried on the merits" framing the issue in terms of the prima facie case "unnecessarily evaded the ultimate question of discrimination *vel non.*" *Id.*, at 713-714. *Aikens* implies that failure to make a prima facie case would be a ground for dismissal of the case at an early stage. See *id.*, at 714, n. 4, see also *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 509 (1993).

> "But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption 'drops from the case,' 450 U. S., at 255, n. 10, and 'the factual inquiry proceeds to a new level of specificity.' " *Aikens*, *supra*, at 714-715 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 255 (1981)) (footnote omitted).

A narrow reading of *Aikens* might limit it to cases where the defendant (*i.e.*, the party accused of discrimination) prevailed in the trial court, leaving the adequacy of plaintiff's prima facie case open to review where the defendant is the appellant. The Courts of Appeals have not understood the *Aikens* rule to be so limited. In *Mitchell* v. *Baldrige*, 759 F. 2d 80, 83 (CADC 1985), the court stated the *Aikens* rule as generally making the prima facie case irrelevant on

appeal for all cases fully tried on the merits. The prima facie case was reviewed on appeal in *Mitchell* because, and only because, the case had been dismissed prematurely, based on a misunderstanding of the prima facie case requirements. See *id.*, at 84.

In *Cumpiano* v. *Banco Santander Puerto Rico*, 902 F. 2d 148, 151 (CA1 1990), the plaintiff had prevailed after a full trial, and the employer appealed, claiming deficiencies in the prima facie case. See *id.*, at 154-155. The court rejected that argument on the merits, see *ibid.*, but also "remark[ed] the essential pointlessness of [such] arguments." *Id.*, at 155. The principle that proof of discrimination is the critical determination "requires the trial court at case's end, as well as a reviewing court, to focus not on the artificial striations of the burden-shifting framework, but on 'the district court's ultimate finding of discrimination *vel non*.' " *Ibid.* (quoting *Jackson* v. *Harvard University*, 900 F. 2d 464, 466 (CA1 1990)). Similarly, in *Hopp* v. *City of Pittsburgh*, 194 F. 3d 434, 436 (CA3 1999), the plaintiffs prevailed at trial, and the city appealed, claiming that a heightened standard for the prima facie case should have been required under the circumstances. See *id.*, at 438. The Third Circuit held that this argument was foreclosed by *Aikens*, " 'and the question whether the plaintiff made out a prima facie case is no longer relevant.' " *Id.*, at 439 (quoting *Tidwell* v. *Carter Products*, 135 F. 3d 1422, 1426, n. 1 (CA11 1998)). In *Boehms* v. *Crowell*, 139 F. 3d 452, 457-458 (CA5 1998), another case of an employer-appellant attacking the employee-plaintiff's prima facie case, the Fifth Circuit held,

> "Because the ebb and flow of burden-shifting is intended to apply at the *interim* stages of the proceeding—*i.e.*, when a party's rights are affected by a record containing less than full proof [cita-

> tion]—a reviewing court need not examine the adequacy of the showing at any stage of the burden-shifting framework after a case has been fully tried on the merits." See also *Imwalle* v. *Reliance Med. Prods.*, 515 F. 3d 531, 545-546 (CA6 2008) (plaintiff's failure to prove element of prima facie case not dispositive after jury trial on the merits).

In other words, the "threshold question of a *prima facie* case of discrimination," which the Illinois Supreme Court made the crux of its rulings in this case, see J. A. 145-146, was never intended to be of particular importance after the trial judge had made the ultimate discrimination ruling. See *Aikens*, 460 U. S., at 715. Once the final determination has been made after a full hearing, there is no point in revisiting a preliminary step intended only to screen out insubstantial cases. That would be like reversing a conviction entered after a full, fair trial on the ground that the evidence at the preliminary hearing was insufficient to bind the defendant over. Most states do not allow an appeal on that ground. See 4 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 14.3(d), pp. 339-340 (3d ed. 2007).

C. Application to Batson.

In its first opinion in the present case, holding that the issue of a prima facie was not rendered moot by a decision on the merits, the Illinois Supreme Court appeared to be oblivious to the roots of the three-step procedure in the employment cases and rendered its decision without any reference to the guidance available in those cases. See *People* v. *Rivera*, 221 Ill. 2d 481, 505-509, 852 N. E. 2d 771, 785-788 (2006). This is particularly surprising given that the court was well aware of *Hernandez* v. *New York*, 500 U. S. 352, 359 (1991) (plurality opinion), which unambiguously cites

Aikens and says *Batson* challenges are governed by the same principle.

In *Hernandez*, the prosecutor offered race-neutral explanations for his strike after Hernandez had raised his *Batson* challenge, but before the defense had made a prima facie case of discrimination. *Id.*, at 356-357. The trial judge allowed the strike and was affirmed by the Appellate Division and the New York Court of Appeals. *Id.*, at 358. In its own affirmance, a plurality of this Court found no error even though the prosecutor had offered explanations without prompting. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Id.*, at 359.

It is correct to note that the *Hernandez* case did come to this Court in an unusual procedural posture, as several lower circuit courts have found when they gave limited scope to *Hernandez*'s language. See *United States* v. *Stewart*, 65 F. 3d 918, 924 (CA11 1995). What remains critical, though, is that *Hernandez* recognizes the Title VII cases as authoritative in a *Batson* challenge.

Another critical element of the *Batson* line of cases is its underlying policy of encouraging judges to inquire into discrimination when the question is close. See *Johnson* v. *California*, 545 U. S. 162, 172-173 (2005). It would be nonsensical to urge trial judges to protect against the " 'harm from discriminatory jury selection . . . ,' " *id.*, at 172 (quoting *Batson*, 476 U. S., at 87), by "asking a simple question" only to reverse the trial judge because his inferences guided him to do so. When something as ominous as racial discrimination rears its head to " 'undermine public confidence in the fairness of our system of justice,' " *ibid.* (quoting *Batson*, *supra*,

at 87), speculation by the trial judge is insufficient protection. See *ibid.* The Illinois Supreme Court's approach of close scrutiny of the prima facie case, lack of deference to the finding, and potential reversal despite a clearly correct finding of discrimination in the final step is contrary to the policy behind *Johnson*.

Without fully understanding the importance of reducing speculation in equal protection claims, some lower courts have limited *Hernandez*'s "moot" language to the specific context of that case. These decisions have read *Hernandez* more narrowly than is warranted. The mootness language was introduced by reference to the Title VII cases that established *Batson*'s three-part test. Keeping this context in mind points us to the correct conclusion.

The Eleventh Circuit's opinion in *United States* v. *Stewart*, 65 F. 3d 918, 924 (1995), is one of the better-reasoned opinions of this type, yet it still misses the mark. *Stewart* involved the conviction of three Ku Klux Klan members who had used three peremptory strikes to remove three of the four African-Americans on the jury. *Id.*, at 922. In such circumstances it would be an understatement to claim discrimination could not be inferred. Ultimately, the Eleventh Circuit did uphold the convictions, recognizing that the appellate court should "give great deference to the district court's finding of a prima facie case." *Id.*, at 923. Applying this standard, the Court of Appeals affirmed the finding. *Id.*, at 926. However, it rejected the argument that an ultimate decision on discrimination made the prima facie case moot. *Id.*, at 924.

Rejection of this argument is inconsistent with the purpose *Batson* was designed to achieve, and the Eleventh Circuit's opinion undercuts public policy goals by distinguishing *Hernandez* on superficial grounds. For the Eleventh Circuit, *Hernandez* was not applicable

because the *Hernandez* trial court had not found discrimination, *Hernandez*'s language was dictum and part of a plurality opinion, and the *Hernandez* prosecutor had offered race-neutral explanations without any prompting by the trial court. See *id.*, at 924. *Hernandez*'s mootness language could not be used to overcome the prima facie case "hurdle" for the party making the *Batson* challenge because this Court had repeatedly described the prima facie case as an integral part of the *Batson* analysis. See *id.*, at 925. The same criticism could be made of *Aikens*, which has effectively eliminated review of trial court findings that the plaintiff did make a prima facie case. The fact that a preliminary step is required does not mean it must be reviewable on appeal. In the extreme, and presumably rare, case that a trial judge is oblivious to the prima facie case requirement and demands explanations of peremptory challenges with no basis for suspicion, see, *e.g.*, *State* v. *Evans*, 100 Wash. App. 757, 760, 998 P. 2d 373, 376 (2000), a peremptory writ would be available and would not likely be needed more than once. In the normal course of events, the judge's respect for precedent and an institutional interest in moving the case along are sufficient to prevent excessive inquiries.

Taken in the proper context, using the *Batson* framework to end discrimination, it is counterproductive to reverse a final judgment because one of the preliminary steps was erroneous or insufficiently documented on the path to a correct result. Only in cases where the evidence available to the appellate court shows that a party was denied a valid challenge would reversal be warranted.

III. The type of discrimination established for a prima facie case need not be exactly the same type found in the final ruling.

The Illinois Supreme Court seemed to think that there was something amiss in the trial judge's suspicions of racial discrimination when the ultimate finding was of gender discrimination. J. A. 157. This important point requires clarification. The discrimination ultimately found in a *Batson* inquiry need not be the same as the type suspected at the prima facie case step.

A. Orderly Presentation of Evidence.

The three preliminary steps in *Batson* were adopted to preserve the orderly presentation of evidence when making a discrimination claim. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). *McDonnell Douglas* articulated a standard framework when two court of appeals decisions had been unable to establish a coherent framework. *Id.*, at 801. In articulating new steps, this Court found it necessary for a party to assert grounds for a claim, listen to the explanations of the other side, and then assert evidence to show the explanations were pretextual. *Id.*, at 802-807. These preliminary steps established a method to allow the judge to weigh all relevant evidence when he made his ruling. Regardless of the reasons beginning the inquiry, once discrimination is clearly evident, see, *e.g.*, J. A. 39, it must be remedied. *Batson* preserved this purpose when it adopted the prima facie framework and recognized that a defendant could "make out a prima facie case of purposeful discrimination by showing the totality of relevant facts [giving] rise to an inference of discriminatory purpose." *Batson* v. *Kentucky*, 476 U. S. 79, 93-94 (1986). It is not reversible *Batson* error if the trial judge finds relevant evidence of one discriminating

purpose after initially suspecting discrimination of some other sort.

B. Satisfaction of Purpose.

In this case, the purpose of the *Batson* framework has been satisfied. The *Rivera* trial court, in chambers, asked defense counsel for "a basis of why you are excusing Ms. Gomez" *sua sponte*. J. A. 34. Defense counsel gave Mrs. Gomez's exposure to gunshot victims as his race-neutral explanation. *Ibid.* The court expressed some skepticism, and asked to hear from the prosecutor, who also did not accept defense counsel's explanation. J. A. 34-35. At this point, the trial judge had sufficient evidence to make a determination on discrimination. He had witnessed both defense counsel's and the prospective juror's demeanor during the selection process (something that cannot be expressed in an appellate record), he had heard counsel's explanation for the strike, had articulated his belief of pretext, and had heard from the prosecutor. There is no evidence that either party was confused as to their roles in the *Batson* process. The goal of having "a sensible, orderly way to evaluate the evidence," *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978), was achieved.

It was not until defense counsel insisted upon further questioning and explanation that the true discriminatory reasons for the strike became apparent. J. A. 36-39. It was here that defense counsel stated he was trying to rebalance the jury so that he would "get some impact from possibly other men in the case." J. A. 39. The statement only gave the trial judge a clearly valid reason to overrule the strike. There is no "balancing" exception to the juror's right not to be discriminated against on the basis of race or gender. See *Rice* v. *Collins*, 546 U. S. 333, 340 (2006) (prosecutor's

"balancing" justification for striking female juror); *id.*, at 336 (correctly rejected).

When both the purpose of the prima facie case and justice have been served, the type of discrimination ultimately found does not matter. A lawful look does not depend upon whether the seeker finds precisely what he set out for. This Court's search and seizure cases provide an analogy. In *Arizona* v. *Hicks*, 480 U. S. 321, 323 (1987), the officers entered Hicks' home to search for the individual who shot a bullet through the floor of Hicks' apartment into the apartment of the man below. *Ibid.* In light of the evidence available to them at the time, the police entered the apartment without a warrant, looking only for the shooter, more victims, and for weapons. *Ibid.* They found weapons and a stocking cap mask. *Ibid.* They also found stolen stereo equipment. *Ibid.* In the course of investigating one crime, the police officers found evidence of another. While this Court ultimately found that moving the stereo equipment exceeded the scope of "plain view," the mere observation of it did not. See *id.*, at 324-325, 328-329.

Like the police officers in *Hicks*, the trial judge in the present case was investigating one type of discrimination when he was presented with clear evidence of another. The fact that the trial judge first believed Mrs. Gomez was being struck because she was African-American does not immunize defense counsel's admission that he was discriminating against her because she was a woman. J. A. 148-149. Neither race nor gender are permissible reasons for striking a juror, *Batson*, 476 U. S., at 90; *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 146 (1994), and where the evidence was presented in an ordered manner, there was no constitutional basis for an appellate court to reverse the judge's correct finding on the ultimate issue.

IV. The trial court properly found a prima facie case.

Batson v. *Kentucky*, 476 U. S. 79, 96 (1986), sets forth the elements of a prima facie case:

> "[F]irst [a party] must show that he is a member of a cognizable racial group, [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[2] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Before the trial court may go forward and request a neutral explanation, the trial court must consider all relevant circumstances.

Taking *Batson*'s steps one at a time, the trial judge's finding of a prima facie case, if reviewed at all, should have been affirmed. First, it was clear that Mrs. Gomez, a party protected from discrimination under *Batson*, was an African-American. J. A. 34. Also, it is clear that defense counsel had been exercising his peremptory strikes against women, J. A. 137, and Mrs.

---

2. This element is no longer essential after *Powers* v. *Ohio*, 499 U. S. 400, 416 (1991), although racial identity of the defendant remains relevant to the third element.

Gomez was the second peremptory strike sought against an African-American woman. J. A. 35, 65, 75.

Second, the *Batson* rule explicitly recognizes that the peremptory challenge process "allows those to discriminate that are of a mind to discriminate." *Batson*, 476 U. S., at 96. This recognition was reinforced in *Georgia* v. *McCollum*, 505 U. S. 42, 53 (1992), when this Court observed, "Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State." See also *Johnson* v. *California*, 545 U. S. 162, 171-172 (2005). Such observations caution trial courts to suspect discrimination during *voir dire*, and this Court's cases have instructed that suspicion of discrimination must not be treated lightly. It was correct for the trial judge to heed such warnings, just as it was incorrect for the Illinois Supreme Court to so easily question them.

The final element of the prima facie case is a showing that the first two factors, plus "other relevant circumstances" are sufficient to raise an inference that the party was discriminating. *Batson*, 476 U. S., at 96. *Batson*'s circumstances can include a "pattern" of strikes against a class of jurors, or counsel's questions and statements during *voir dire*. *Id.*, at 97. But these "illustrative" circumstances are not meant to trump the judgment of "trial judges, experienced in supervising *voir dire*." *Ibid.* The *Batson* Court's confidence in that experienced-based judgment implies that when it is proper to review the finding of a prima facie case, review should be deferential and not *de novo*. Compare *Tolbert* v. *Page*, 182 F. 3d 677 (CA9 1999) (en banc), with J. A. 152-154.

The circumstances surrounding Rivera's peremptory strikes are sufficient to uphold the trial judge's finding

of a prima facie case. That is, the circumstances justify his *sua sponte* decision to ask for explanation. First, Mrs. Gomez, the victim, and the victim's mother—an anticipated witness—were all African-American. J. A. 78. Second, defense counsel had already exercised three strikes and one had been to excuse an African-American. J. A. 35; Brief in Opposition 2. He had used two of the three strikes against women. Brief in Opposition 2. The number of African-Americans and women on the venire remains unclear, but, if defendant had been able to use his fourth strike against Mrs. Gomez, 50% of his exercised strikes would have been against African-Americans, and 75% would have been against women. At this point, the State had exercised only one peremptory strike.

Also relevant is Mrs. Gomez's responses during *voir dire*. She stated she believed she could be fair, she did not know any of the attorneys or Mr. Rivera, or any people who might be called as witnesses. J. A. 30. She did not have immediate family ties to law enforcement, she was not a crime victim, nor had she read anything about the case. *Ibid*. She also stated that her clerical job at Cook County Hospital would not have any effect on her as she viewed the evidence in Rivera's case. J. A. 32-33. In particular she stated for defense counsel that her "treatment of those in the out-patient clinic," would not "set [her] off one way or another against [Rivera]." J. A. 33. Following her statement of impartiality, defense counsel moved to excuse Mrs. Gomez.

At this point the trial judge had sufficient evidence to support a suspicion under *Batson*'s three-part test. The court had been watching the entire *voir dire* process and was free to infer that defense counsel was discriminating. Under the principle of *Johnson*, he was also free to ask questions about counsel's motives. In chambers, the trial judge stated, "I did this *sui spontae*

[sic] because I was concerned about the right of Mrs. Gomez to be a juror and participate. If the State in fact had done this, I certainly would have found they would have established a prima facie case by the very [same] reason . . . ." J. A. 35-36. As far as he was concerned, "it is more than a prima facie case of discrimination against Mrs. Gomez." J. A. 36.

The trial court's inference was not unwarranted. Later proceedings reveal further evidence which support a pattern of discriminatory defense practices. After the trial court seated Mrs. Gomez, the defense asked the court to strike a juror who had already been seated. J. A. 40-41. The juror, a white male, was seated next to a Hispanic woman sitting in the back row. J. A. 56. By striking the white male, the defense was able to question, and eventually seat, the Hispanic woman. *Ibid.* The action undermines his assertion that he wished to seat more men. J. A. 39. This action only adds to the case that, when combined with other circumstances, the defense did not want African-American women on his jury. Although these proceedings took place after the *Batson* challenge, it is one more fact in support of the trial judge's unarticulated inference that discrimination was taking place.

If *Batson* is truly meant "to produce actual answers to suspicions and inferences that discrimination may have infected the jury process[,]" *Johnson*, 545 U. S., at 172, then "the first step [cannot] be so onerous that a [party] would have to persuade the judge—on the basis of all the facts, some of which are impossible for the [party] to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Id.*, at 170. The same is true when the judge raises the issue *sua sponte*. If inference is really enough, then the facts of this case are sufficient to give rise to an inference.

Johnson's relatively low threshold was good law when the Illinois Supreme Court remanded the case to allow the trial judge to articulate his reasons for his challenge. The case did not need to be remanded. The trial judge had sufficient reason to inquire. Upon inquiry, his finding of discrimination was not clearly erroneous. Indeed, it is clearly correct. See *supra*, at 21. The intermediate appellate court in this case got it right the first time, five years ago. See *People* v. *Rivera*, 348 Ill. App. 3d 168, 178, 810 N. E. 2d 129, 137-138 (2004).

CONCLUSION

The judgment of the Illinois Supreme Court, to the extent it affirms the judgment of the appellate court and circuit court, should be affirmed.

January, 2009

Respectfully submitted,

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE BRIEF

No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF FLORIDA, ALABAMA, ARIZONA, COLORADO, DELAWARE, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

BILL MCCOLLUM
Attorney General of Florida
Scott D. Makar*
Solicitor General
Courtney Brewer
Craig D. Feiser
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
*Counsel of Record

BEST AVAILABLE COPY

Troy King
Attorney General
Office of the Alabama Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130

Terry Goddard
Arizona Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

John W. Suthers
Attorney General
State of Colorado
1525 Sherman St., Seventh Floor
Denver, Colorado 80203

Richard S. Gebelein
Chief Deputy Attorney General
State of Delaware
820 N. French Street
Wilmington, Delaware 19801

Mark J. Bennett
Hawaii Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Steve Six
Attorney General
State of Kansas
120 SW 10th Ave
Topeka, Kansas 66612

Tom Miller
Attorney General
Iowa Attorney General's Office
2nd Floor Hoover Building
Des Moines, IA 50319

Lawrence G. Wasden
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Gregory F. Zoeller
Attorney General of Indiana
302 West Washington Street
Indiana Government Center
South, Fifth Floor
Indianapolis, IN 46204

Douglas F. Gansler
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

Michael A. Cox
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909

Chris Koster
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

Steve Bullock
Montana Attorney General
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401

Kelly A. Ayotte
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Anne Milgram
Attorney General of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, NJ 08625

Gary K. King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Roy Cooper
Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

Richard Cordray
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-4894

John R. Kroger
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, Oregon 97310

Thomas W. Corbett, Jr.
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Henry D. McMaster
Attorney General of South
Carolina
P. O. Box 11549
Columbia, South Carolina 29211

Lawrence E. Long
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Robert E. Cooper, Jr.
Attorney General and Reporter of
Tennessee
P.O. Box 20207
Nashville, TN 37202-0207

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114-2320

William Sorrell
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

Robert M. McKenna
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

J.B. Van Hollen
Attorney General
State of Wisconsin
WI Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

QUESTION PRESENTED

Whether a state trial court's good faith error in denying a criminal defendant's peremptory challenge requires reversal of a subsequent conviction as a matter of federal law, when that error did not deprive the defendant of a fair trial by an impartial jury or otherwise violate any federally protected right?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF AMICI INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. This Court's Precedents and the Practical Impact of an Automatic Reversal Rule on State Peremptory Challenge Laws Weigh Heavily Against a Finding of Structural Error. 3

A. Peremptory challenges are statutory privileges that are unnecessary to meet the Sixth Amendment impartial jury requirement 5

B. An automatic reversal rule is ill-advised given the uniqueness of peremptory challenge systems among the states. 8

C. An automatic reversal rule will cause states to consider limiting or even eliminating peremptory challenges, thereby impacting jury selection issues underlying *Batson* 13

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Alex v. Rayne Concrete Serv.,
951 So. 2d 138 (La. 2007) 16

Arizona v. Fulminate,
499 U.S. 279 (1991) 7

Batson v. Kentucky,
479 U.S. 79 (1986) ..... *passim*

Brecht v. Abramson,
507 U.S. 619 (1993) 14

Busby v. State,
894 So. 2d 88 (Fla. 2004) 11

Commonwealth v. Basemore,
744 A.2d 717 (Pa. 2000) 17

Commonwealth v. Carson,
741 A.2d 686 (Pa. 1999) 11

Cooper v. California,
386 U.S. 58 (1967) 12

Diomampo v. State,
185 P.3d 1031 (Nev. 2008) 17

Frazier v. United States,
335 U.S. 497 (1948) 5, 15, 20

Georgia v. McCollum,
505 U.S. 42 (1992) 8, 15, 18

Golden v. State,
127 P.3d 1150 (Okla. Crim. App. 2006) 11

Hedgpeth v. Pulido,
129 S. Ct. 530 (2008) 7

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 8, 14, 16

Klahn v. State,
96 P.3d 472 (Wyo. 2004) 15

Lyons v. United States,
683 A.2d 1066 (D.C. 1996) 12

McDonough Power Equipment, Inc. v. Greenwood,
464 U.S. 548, 556 (1984) 19

Morales v. State,
992 P.2d 252 (Nev. 2000) 20

People v. Bell,
702 N.W.2d 128 (Mich. 2005) 11, 16, 17

People v. Rivera,
879 N.E. 2d 876 (Ill. 2007) 3, 4

Praus v. Mack,
626 N.W.2d 239 (N.D. 2001) 20

Rose v. Clark,
478 U.S. 570 (1986) 7

Ross v. Oklahoma,
487 U.S. 81 (1988) 6

Shane v. Commonwealth,
243 S.W.3d 336 (Ky. 2007) 11

State v. Cantu,
750 P.2d 591 (Utah 1988) 17

State v. Hickman,
68 P.3d 418 (Ariz. 2003) 7, 15

State v. Lindell,
629 N.W.2d 223 (Wis. 2001) 16

State v. Lowe,
677 N.W.2d 178 (Neb. 2004) 17

State v. Shrader,
881 So. 2d 147 (La. Ct. App. 2004) 18

Stilson v. United States,
250 U.S. 583 (1919) 5

Taylor v. Commonwealth,
486 S.E.2d 108 (Va. Ct. App. 1997) 19

United States v. Annigoni,
96 F.3d 1132 (9th Cir. 1996) 13, 14

United States v. Blouin,
666 F.2d 796 (2d Cir. 1981) 10

United States v. Esparza-Gonzalez,
422 F.3d 896 (9th Cir. 2005) 10

United States v. Martinez-Salazar,
528 U.S. 304 (2000) 3, 5, 6, 11

Whitney v. State,
857 A.2d 625 (Md. Ct. Spec. App. 2004) 20

Young v. United States,
694 A.2d 891 (D.C. 1997) 19

CONSTITUTIONAL PROVISIONS, STATUTES, AND RELATED MATERIALS

Alaska R. Crim. P. 24(e) 9

Cal. Code Civ. P. § 231(d) 9

Cal. Code Civ. P. § 234 9

Conn. Const. amend. art. IV 15

Conn. Gen. Stat. § 54-82g 8

Del. Super. Ct. Crim.
P.R. 24(b)(3) 9

Fed. R. Crim. P. 24(b) 3

Fla. R. Civ. P. 1.431(d) 9

Ill. Sup. Ct. R. 434(a) 9

La. C. Crim. Proc. art. 795(B)(2) 10

La. Const. art. I, § 17 15

Md. Rule 2-512(e)(2) 9

Md. Rule 4-313(a)(4) 9

N.C. Gen. Stat. § 15A-1214(d) 9

N.C. Gen. Stat. § 15A-1214(e) 9

N.J. Stat. § 2B:23-13 8

N.Y. Crim. Proc. Law § 270.15(2) 9

Okla. Stat. tit. 22, § 575.1 9

Or. Rev. Stat. § 135.230(2) 10

U.S. Const. amend. VI 5

Va. Code Ann. § 19.2-262 9

Vt. Stat. Ann. tit. 12 § 1941 9

MISCELLANEOUS

Leonard B. Sand, *From the Bench:* Batson *and Jury Selection Revisited*, 22 Litig. 3, 4 (1996) 10

William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391 (2001) 14

STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case because their laws create the peremptory challenge rights that are implicated herein. They agree with the Illinois Supreme Court that the denial of peremptory strikes is not structural error subject to per se reversal. Instead, a state should remain free to apply its own harmless error analysis when an error violates its statute, which provides the proper balance between trial errors and due process concerns. An automatic reversal rule, which imposes the costs associated with retrials without this balancing process, creates an incentive for state legislatures to avoid the potential for such costs by eliminating peremptory challenges altogether. Thus, assigning constitutional weight to errors in administering peremptory challenges could have the unintended consequence of reducing the laudable uses of peremptory challenges in state trials.

SUMMARY OF ARGUMENT

The improper denial of a peremptory challenge does not amount to structural error. A holding to the contrary would be a dramatic departure from this Court's jurisprudence, and its practical consequences weigh against such a decision. Peremptory challenges are firmly a part of state jury trials, and states have wide discretion in administering their jury selection systems. Because peremptory challenges are unnecessary to meet the Sixth Amendment requirement of an impartial jury, states may generally restrict peremptory challenge rights without implicating constitutional concerns. A constitutionally-compelled automatic reversal rule, resulting in costly retrials even in cases where the error is harmless, could prompt states to consider limiting or even eliminating peremptory challenges. Defendants' rights to peremptory challenges thereby would be diminished by a per se reversal rule. Such a rule could also jeopardize the application of harmless error analysis to other routine issues arising under state peremptory challenge laws. This Court should avoid these potential unintended consequences and affirm the Illinois Supreme Court's decision below.

ARGUMENT

I. This Court's Precedents and the Practical Impact of an Automatic Reversal Rule on State Peremptory Challenge Laws Weigh Heavily Against a Finding of Structural Error.

State law dictates the parameters of state peremptory challenges. Every state has designed and implemented systems that permit peremptory challenges.[1] Indeed, peremptory challenges are considered a key component of trial strategy, enabling trial participants to eliminate potential jurors for practically any reason subject to specific constitutional constraints. Although they are a well-established component of jury trials in the state court systems, they are not required under the federal constitution. *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) ("unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.").

Here, the Illinois Supreme Court concluded that if the erroneous denial of a peremptory challenge even implicates constitutional concerns (and it does not), such an error is subject to harmless error review. *People v. Rivera*, 879 N.E.2d 876, 887

[1] *See* Appendix (chart of 50 states' and District of Columbia's laws or rules providing for number of peremptory challenges in criminal trials). Congress sets the number of peremptory challenges available in federal trials. Fed. R. Crim. P. 24(b).

(Ill. 2007) ("we do not see the error as one fitting within the Supreme Court's framework of 'structural errors.'"). In reaching its decision, the court noted that peremptory challenges lack a federal constitutional dimension. *Id.* at 885 ("...the Supreme Court no longer considers peremptory challenges indispensable to a fair trial or their erroneous denial a matter necessarily requiring reversal.").

A rejection of this approach is likely to have significant negative implications for existing peremptory challenge laws and trial strategy. An automatic reversal rule could potentially turn peremptory challenges from useful tools that increase the likelihood of a fair trial into tactical tools that unnecessarily burden the state court systems. Under an automatic reversal rule, state legislatures are more likely to view peremptory challenges as expensive and burdensome rather than as an important part of the jury trial tradition, particularly if the rule essentially federalizes the administration of peremptory challenge laws. Based on deference to the role of the states in fashioning their own peremptory challenge laws, the Illinois Supreme Court's decision should be affirmed to ensure that states retain the independence and motivation to preserve peremptory challenges.

A. Peremptory challenges are statutory privileges that are unnecessary to meet the Sixth Amendment impartial jury requirement.

This Court has long held that the peremptory challenge is not a federal constitutionally-guaranteed right. *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases..."). While states have given them their due importance in the trial process, this Court has refused to elevate them to either constitutional or fundamental rights. *Martinez-Salazar*, 528 U.S. at 311 (recognizing that "[t]he peremptory challenge is part of our common law heritage," but it is "auxiliary"). Instead, peremptory challenges are a privilege that a state may eliminate entirely without violating the constitution. *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948) (noting that the peremptory challenge is "a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of 'an impartial jury' and a fair trial."). Moreover, the Sixth Amendment guarantees defendants in criminal trials the right to an impartial jury, which peremptory challenges may facilitate; but the Constitution does not establish any right for defendants to choose their jury. U.S. Const. amend. VI; *see also Stilson*, 250 U.S. at 586 ("...trial by an impartial jury is all that is secured.").

As a means of facilitating impartial juries, peremptory challenges form an important part of federal and state statutory law to which this Court has traditionally given much discretion. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) ("Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.") (citations omitted). As a result, Congress and the state legislatures have designed their own unique systems for jury selection, including the number of peremptory strikes available to each side and the manner in which those strikes may be exercised.

In cases dealing with possible misuse of peremptory challenges, this Court has avoided per se reversal rules. For example, in *Martinez-Salazar*, this Court held that a criminal defendant's federal right to peremptory challenges was not violated when the defendant peremptorily struck a juror whom the trial judge should have excused for cause. 528 U.S. at 315. Similarly, in *Ross v. Oklahoma*, this Court rejected the argument that mandatory reversal is required where "the failure to remove [a prospective juror] may have resulted in a jury panel different from that which would otherwise have decided the case[.]" 487 U.S. at 87.

This Court's restraint is appropriate here because peremptory strikes including their improper denial by a trial court do not meet the exceptional standard required to establish structural error. This type of error mandates reversal because it

is so closely woven into the framework of the trial process that it is presumed to affect the outcome. *Arizona v. Fulminate*, 499 U.S. 279, 309-10 (1991). Peremptory challenges, as a statutory privilege that a state need not even allow, do not fit this definition. As argued by respondent, "[t]he loss of a peremptory challenge does not implicate the fundamental interests for which structural error is reserved." Resp. Br. at 8. Moreover, this Court reiterated last year that characterizing errors as structural errors is the exception, and not the rule. *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008). The structural error definition is so narrow, "if the defendant had counsel and was tried by an *impartial* adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579 (1986) (emphasis added).[2]

This Court's jurisprudence reflects the principle that the intricacies of peremptory strike

[2] The Supreme Court of Arizona adopted a two-part test to assist in determining whether an error is amenable to harmless error analysis and therefore not structural error: "(1) is the error the kind of error that will likely affect the reliability of the truth-finding process?; and (2) is the truth finding impact of the error incapable of rational assessment?" *State v. Hickman*, 68 P.3d 418, 425 (Ariz. 2003) (citation omitted). Applying Arizona's test to this case, the improper denial of a peremptory challenge should not be deemed structural error. The impact of one juror's presence is, admittedly, impossible to estimate. But the reliability of the entire trial as a truth-finding process should not be legitimately in issue when a jury is composed of jurors different from that which the defendant would have selected, absent the argument that the seated juror was not impartial (and therefore should have been excused for cause).

laws are left to the states, and that errors in their administration at trial are generally not of federal constitutional significance. Only when a peremptory challenge implicates the Sixth and Fourteenth Amendment rights of defendants or jurors has the Court limited the states' control over their peremptory challenge systems with constitutional requirements. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that peremptory challenges may not be based on the sex of the juror); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that criminal defendants may not base a peremptory challenge on juror's race); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the state may not base its peremptory challenges on the race of jurors).

B. An automatic reversal rule is ill-advised given the uniqueness of peremptory challenge systems among the states.

A per se reversal rule would fail to account for the many differences and nuances among the states. Each state has adopted its own unique system for administering peremptory strikes. As an example, states vary on the number of strikes each party is allotted in a trial. In Connecticut capital trials, both the state and the defendant receive 25 peremptory strikes. Conn. Gen. Stat. § 54-82g (2008). For a misdemeanor, each side receives three. *Id.* In New Jersey felony trials, by contrast, the state receives 12 peremptory challenges, compared to the defendant's 20. N.J. Stat. § 2B:23-13 (2008). For all other trials, each side receives ten challenges. *Id.* In Virginia, capital and felony defendants as well as the state

receive only four peremptory challenges, just one more than that allotted to each side in misdemeanor trials. Va. Code Ann. § 19.2-262 (2008). *See* Appendix for complete state information on the number of peremptory challenges in criminal trials of a single defendant.

The uniqueness of state systems are apparent in other aspects of juror selection, such as the number of peremptory challenges allotted to parties in cases of juror alternates, the presence of multiple defendants in a single trial, and civil trials.[3] So too do states have different methods for the actual jury selection and procedure by which peremptory challenges may be asserted.[4] The validity of these

[3] For example, in Florida civil litigants are each entitled to three peremptory challenges. Fla. R. Civ. P. 1.431(d). In Vermont, each civil party receives six challenges, the same number parties in all trials receive. Vt. Stat. Ann. tit. 12, § 1941 (2008). Most states allot one peremptory challenge per alternate juror. *See, e.g.*, Cal. Code Civ. P. § 234. But this is not always the case. In Maryland, for example, parties are allotted one peremptory challenge per three alternate jurors at a civil trial. Md. Rule 2-512(e)(2). In criminal trials, the state is permitted one and a defendant two additional peremptory challenges per alternate juror. Md. Rule 4-313(a)(4).

[4] Jury selection methods not only vary from state to state, statutes often specifically leave to the individual trial judge's discretion the particulars of jury selection. *See, e.g.*, Alaska R. Crim. P. 24(e); Ill. Sup. Ct. R. 434(a); N.Y. Crim. Proc. Law § 270.15(2); Okla. Stat. tit. 22, § 575.1. Although most statutes provide for alternating strikes beginning with the state, *see, e.g.*, Cal. Code Civ. P. § 231(d), that is not always the case. *See* Del. Super. Ct. Crim. P.R. 24 (b)(3) (defendant makes the first peremptory strike); *see also* N.C. Gen. Stat. § 15A-1214(d-e) (prosecutor must make all peremptory challenges to a panel of (Continued...)

unique features and the differences they create in jury selection processes from state to state would be in question were this Court to place constitutional weight on the peremptory challenge right.

Equally unique are the methods developed by state courts for assessing trial court errors in peremptory challenges and challenges for cause under state law frameworks. For example, some state courts, even after this Court's decision in

12 before that panel is tendered to the defense to make its challenges). Some states require that challenges be made at a sidebar conference, La. C. Crim. Proc. art. 795(B)(2), others require that the challenges be done by "secret ballot," Or. Rev. Stat. § 136.230(2), and still others make no mention in either rule or statute of where or how the challenges are to be made.

The two most commonly noted categories of methods for using peremptory challenges are the "jury box" and "struck jury" systems. *See United States v. Blouin*, 666 F.2d 796, 796-97, 797 n.1 (2d Cir. 1981) (detailing both methods). The key difference in these methods is that when a prospective juror is struck in the jury box method, it is not necessarily known who will replace the stricken juror. *Id.* at 796. In the struck jury method, the size of the selection array is equal to the number of jurors and alternates required at trial plus all possible peremptory challenges, so the parties may anticipate who will take the place of a juror they strike. *Id.* at 796-97. While "the struck jury system has long been criticized for allowing the racial engineering of jurors," *United States v. Esparza-Gonzalez*, 422 F.3d 896, 902-903 (9th Cir. 2005), "[p]roponents of the struck panel system have argued that it makes jury selection more intelligent." Leonard B. Sand, *From the Bench: Batson and Jury Selection Revisited*, 22 Litig. 3, 4 (1996). Regardless of the criticism leveled against the struck jury system, it has not been deemed a violation of the Sixth Amendment, and its use continues. *Esparza-Gonzalez*, 422 F.3d at 902-903.

Martinez-Salazar, have found that wrongful denials of for cause challenges corrected by a party's use of a peremptory strike[5] not only impair the right to peremptory strikes, but also may be per se reversible error under state law analyses. *See Busby v. State*, 894 So. 2d 88, 100-102 (Fla. 2004) (holding that under Florida law, harm is shown when a juror was seated whom the defendant suspects is biased); *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007) ("There is nothing in [this Court's precedents] that requires the states to adopt their reasoning as to the weight, or 'substantial' value a state may place on the exercise of peremptory strikes."); *Golden v. State*, 127 P.3d 1150, 1155 (Okla. Crim. App. 2006) (reversing verdict where defendant did not receive the peremptory challenges he was due under Oklahoma law).

Other state courts have treated peremptory challenge rights differently, finding no basis for automatic reversal when errors occur in their administration. In these states, infringements on peremptory challenge rights are subject to harmless error analyses. *People v. Bell*, 702 N.W.2d 128, 138 (Mich. 2005) (noting that had error been found in denying a peremptory challenge, court would have applied harmless error analysis before determining whether reversal was appropriate); *Commonwealth v. Carson*, 741 A.2d 686, 696 (Pa. 1999) (refusing to reverse conviction where no prejudice demonstrated

[5] As recognized by both the petitioner and respondent, "insofar as this kind of error may 'result in an individual sitting on the jury who would not have,' the issue is the 'same' as the question presented here." Resp. Br. at 48 n.5 (quoting Pet. at 3).

because appellant did not show that a particular seated juror he attempted to peremptorily strike was biased or incompetent); *Lyons v. United States*, 683 A.2d 1066, 1072 (D.C. 1996) (holding that violation of the right to a peremptory challenge is not a structural error).

These different layers of analysis reflect the individuality of the state courts and their state common law. Trials are unique from state to state, save for the consistent application of federal constitutional guarantees (e.g., the right to counsel, the right to examine witnesses). The right to peremptory challenges is not among these guarantees in the Constitution. For this reason, state law determines whether harmless error review applies. Indeed, a contrary rule would preempt state outcomes and create an environment in which peremptory challenges become disfavored as a tool for facilitating fair trials.

In the state cases described above, federal law was irrelevant to the question as to what standard of review should apply. If the Court here concludes that federal law governs, however, it should do no more than set a "floor" of harmless error review and allow states to provide greater protections. *See* Resp. Br. at 15 ("States always retain the 'power to impose higher standards ... than required by the Federal Constitution,' '[a]nd when such state standards alone have been violated the State is free, without review by [this Court], to apply its own state harmless-error rule to such errors of state law.' *Cooper v. California*, 386 U.S. 58, 62 (1967).") (alterations in original).

C. An automatic reversal rule will cause states to consider limiting or even eliminating peremptory challenges, thereby impacting jury selection issues underlying *Batson*.

An automatic reversal rule is likely to work mischief by undermining the importance of states' control over the use of peremptory challenges and remedies for their misuse. A decision deeming peremptory challenge error a constitutional violation requiring automatic reversal creates incentives for state legislatures to limit or eliminate peremptory strikes. Automatic reversal means a new trial with all of its attendant costs to the state court system. To avoid the potential for these duplicative and wasteful costs, legislatures might impose a variety of restrictions on the use of peremptory challenges. Indeed, trial court errors arising from the denial of peremptory strikes can be eliminated altogether by eliminating peremptory challenges altogether.

As warned by Judge Kozinski, a decision that peremptory challenges are structural error subject to per se reversal "will make peremptory strikes too dear a luxury." *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (Kozinski, J., dissenting). Such a decision "turns every peremptory challenge error into a retrial [and] gives a strong incentive to federal and state legislators to cut down the number of peremptories or eliminate them altogether." *Id.*

A legislature's inclination to restrict or eliminate peremptory strikes might be particularly heightened because trial court errors may be more

likely to occur in the fast-paced process of jury selection. Decisions to grant or deny peremptory strikes may involve unquantifiable feelings or observations on the part of the judge about the credibility or believability of the counsel attempting to make the challenges. Claims of errors during jury selection are accordingly among the most common of all grounds for criminal appeals. William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 Am. Crim. L. Rev. 1391, 1391 (2001). Justice O'Connor noted in 1994, only eight years after the Court's decision in *Batson*, that "*Batson* minihearings are now routine in state and federal trial courts, and [that] *Batson* appeals have proliferated as well." *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127, 144 (1994) (O'Connor, J., concurring); *see also Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting) ("rare is the trial where one side or the other does not rattle a *Batson* sabre"). Because *Batson* challenges are "routine" in trials, it necessarily follows that trial judges must routinely conduct *Batson* analyses. Turning each of these analyses into the opportunity for reversible error places an enormous burden on the states.

Trials are expensive. This Court gives weight to whether its decisions will "undermine[] the States' interest in finality." *Brecht v. Abramson*, 507 U.S. 619, 637 (1993). States, if faced with the possibility of mandatory new trials every time an error occurs in assessing the motive behind a peremptory challenge, will find alternatives to the use of peremptory challenges. One way of limiting the potential for retrials, as Judge Kozinski has argued, will be to limit the number of peremptory challenges

permitted.[6] As this Court has recognized, states would not violate the constitutional rights of litigants were they to flat out prohibit peremptory challenges. *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) ("This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948).

The costs to the courts, as well as the impacts on all trial participants including victims and their families, are not the only negative implications of automatic retrials in these circumstances. A per se reversal rule "would be an exercise of form over substance," because peremptory challenges are not accorded the same weight as the right to a fair and impartial jury. *State v. Hickman*, 68 P.3d 418, 426 (Ariz. 2003) (applying harmless error analysis to improper denial of for cause challenge cured by defendant's use of a peremptory strike). "It simply does not make any sense to require a new trial where a verdict is constitutionally sound." *Klahn v. State*, 96 P.3d 472, 483 (Wyo. 2004) (holding that absent a showing of prejudice, the wrongful denial of a for cause challenge should not be reversed). And such

[6] Only two states, Connecticut and Louisiana, have constitutions that affirmatively establish peremptory challenge rights. Conn. Const. amend. art. IV ("In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law."); La. Const., art. I, § 17 ("The accused shall have a right ... to challenge jurors peremptorily.").

costs would be needlessly imposed "because the Constitution simply does not require the result." *J.E.B.*, 511 U.S. at 156 (Rehnquist, C.J., dissenting).

The Wisconsin Supreme Court recognized the practical problems of an automatic reversal rule when it departed from its own precedent and held that when a peremptory strike is used to correct the improper denial of a for cause challenge, the error is subject to harmlessness review. *State v. Lindell*, 629 N.W.2d 223, 236, 247 (Wis. 2001) (noting that the court had "come to recognize some of the systemic problems" its earlier decision had created). First, "[t]he multitude of fact-intensive challenges involving shades of gray are bound to produce some trial court error. This error is not likely to be deterred by the sanction of a new trial because there is no intent by the circuit court to commit error." *Id.* at 247. Additionally, the court was troubled that the previous decision "requires a new trial in cases where the trial was nearly perfect and the verdict is unquestionably sound," while it examined other errors "both statutory and constitutional ... for harmful effect." *Id.* at 249 (footnotes omitted). Such practical problems illuminated the effect of placing the peremptory right "on a pedestal above others, and [that] it is not worthy to be there." *Id.* at 250.

Additionally, many states have already interpreted the language in *Batson* as creating per se reversible error when a *Batson* challenge is improperly *denied*. *See, e.g.*, *Alex v. Rayne Concrete Serv.*, 951 So. 2d 138, 155 (La. 2007) ("Errors regarding discrimination in the composition of the grand jury or petit jury are not harmless."); *People v.*

Bell, 702 N.W.2d 128, 138 (Mich. 2005) ("A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal."); *State v. Lowe*, 677 N.W.2d 178, 188 (Neb. 2004) (holding that state's improper use of peremptory challenge in violation of equal protection was structural error); *Diomampo v. State*, 185 P.3d 1031, 1037 (Nev. 2008) ("Discriminatory jury selection in violation of *Batson* generally constitutes 'structural' error that mandates reversal."); *Commonwealth v. Basemore*, 744 A.2d 717, 734 (Pa. 2000) ("*Batson* violations fall within a limited and unique category of claims which, by the nature of their impact upon the fundamental fairness of a trial, are not subject to conventional harmless error or prejudice analysis."); *but see State v. Cantu*, 750 P.2d 591, 597 (Utah 1988) (remanding for further analysis and noting that if challenge violated *Batson*, a new trial should be ordered unless error was harmless beyond a reasonable doubt). Finding structural error in these cases arguably is supported by federal constitutional law, because the Fourteenth Amendment rights of a juror are at stake. *Bell*, 702 N.W.2d at 138 (recognizing distinction between a *Batson* error and the denial of a peremptory challenge); *see also* Resp. Br. at 23 ("reversal is required in such cases to deter discrimination and safeguard broader societal interests").

But if error is per se reversible when committed in *denying* a *Batson* challenge, and per se reversible when committed in *granting* a *Batson* challenge, then any time a *Batson* challenge is raised

the potential is created for automatic reversible errors. Limiting the opportunity for *Batson* error at all would become an attractive option to legislatures. Similarly, prosecutors might find themselves hesitant to assert the equal protection rights of jurors (which they have standing to do, *see McCollum*, 505 U.S. at 56), lest they risk opening the door to reversible error. Likewise, trial judges, such as the one in this case, may be less willing to sua sponte act when they spot potentially race- or sex-based strikes.

Applying a per se reversal rule to these errors also could lead to the constitutionalization of other issues of state law regarding peremptory challenges. *See* Resp. Br. at 25-28. Adopting petitioner's argument that "[s]trict adherence to propriety in the construction of the foundational components of a trial cannot be compromised by harmless-error review," Pet. Br. at 17, would essentially make every detail during jury selection, and the eventual composition of the jury, subject to per se reversal if erroneous. Therefore, clerical mix-ups of a jury selection panel, resulting in the presence of a juror that should not have been on the venire panel at all, could create automatically reversible error. Resp. Br. at 25-28. In states in which backstriking of jurors is permitted, the trial court improperly granting or denying a defendant permission to backstrike could also become an issue subject to automatic reversal. *State v. Shrader*, 881 So. 2d 147, 153 (La. Ct. App. 2004) (holding that erroneous denial of a backstrike is subject to harmless error review).

A decision from this Court reversing the Illinois Supreme Court could impact errors at trial that are not even attributable to the state or trial court. For instance, this Court has held that when jurors, either intentionally or unwittingly, fail to disclose information during voir dire, parties may not obtain new trials unless they can "show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (noting that an automatic reversal rule "is contrary to the practical necessities of judicial management."). Other jurisdictions have similarly subjected such errors to harmlessness review. *See Young v. United* States, 694 A.2d 891, 897 (D.C. 1997) (affirming denial of new trial because seating of ineligible, possibly biased, but not impartial juror who failed to disclose grounds for ineligibility during voir dire is not structural error); *Taylor v. Commonwealth*, 486 S.E.2d 108, 111 (Va. Ct. App. 1997) (affirming denial of mistrial because juror's "presence on the jury did not affect the essential fairness of the trial, notwithstanding the impairment to appellant's right of peremptory challenge."). Should the Court find grounds for automatic reversal in this case, it risks creating conflict with its previous reasoning that the interests of finality outweighed the importance of a perfect peremptory challenge process. *McDonough*, 464 U.S. at 555. If the impairment or denial of a defendant's peremptory challenge rights becomes structural error, would the circumstances in *McDonough*, though entirely outside of the control of the court system, also be subject to automatic reversal?

The number of peremptory challenges, a matter long left to the states' discretion, also could become a critical part of the right to an impartial jury. If the improper denial of peremptory challenges is structural error, would it also be structural error to misinterpret the statute so as to grant the wrong number of peremptory strikes allotted to each side? *See, e.g., Whitney v. State*, 857 A.2d 625, 633-35 (Md. Ct. Spec. App. 2004) (finding that trial judge's error in number of strikes allotted defendant would be per se reversible, but counsel's failure to object to trial court's error did not rise to prejudice required for reversal under ineffective counsel standard); *Praus v. Mack*, 626 N.W.2d 239, 249 (N.D. 2001) (holding that plaintiff failed to show prejudice or abuse of discretion resulting from trial court's decision to give defendants additional peremptory challenges); *Morales v. State*, 992 P.2d 252, 253 (Nev. 2000) ("The improper limitation of peremptory challenges is not subject to harmless error analysis..."). Should the number of peremptory strikes be limited at all if they are so critical to the truth-finding jury function as to be deemed structural error when they are improperly denied?

The constitutionalizing of the peremptory strike has the potential to lead to a variety of changes in long-standing, historically state-controlled procedures of jury selection. Elevation of the peremptory challenge right and certain jury compositions would require reversal of this Court's precedent and states would have to reconsider the design of their peremptory challenge systems based on that precedent. *Frazier*, 335 U.S. at 508 ("There is ... no right to any particular composition or group

representation on the jury."). This Court should not now deviate from the path it has created. Such deviation could lead to the imposition of limitations on peremptory challenges, a facet of jury trials which, while not a fundamental right, are an important right of all trial participants and a strategic part of jury trials. Therefore, this Court should affirm the Illinois Supreme Court's decision below, find that the improper denial of a peremptory challenge is not a structural error, and leave to the states the authority to determine the reversibility of errors in administering peremptory challenges.

CONCLUSION

For all of the above reasons, this Court should affirm the Illinois Supreme Court's decision below.

Respectfully submitted,

BILL MCCOLLUM
Attorney General of Florida

Scott D. Makar*
Solicitor General of Florida
Courtney Brewer
Craig D. Feiser
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
Counsel of Record

January 28, 2009

APPENDIX

Number of Peremptory Challenges in Criminal Trials[a]

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Alabama	Ala. Code § 12-16-100(a)	12	12	6	6	3	3
Alaska	Alaska R. Crim. P. 24(d)	N/A		10	10	3	3
Arizona	Ariz. R. Crim. P. 18.4(c)	10	10	6	6	2	2
Arkansas	Ark. Code Ann. § 16-33-305	10	12	6	8	3	3
California	Cal. Civ. Proc. Code § 231	20	20	20/ 10[b]	20/ 10	10/ 6	10/ 6
Colorado	Colo. Rev. Stat. § 16-10-104	10	10	5	5	3	3
Connecticut	Conn. Gen. Stat. § 54-82g	25	25	15/ 6[c]	15/ 6	3	3
Delaware	Del. Super. Ct. Crim. R. 24(b)	12	20	6	6	6	6
D.C.	D.C. Code § 23-105	20	20	10	10	3	3
Florida	Fla. Stat. § 913.08	10	10	10/ 6[d]	10/ 6	3	3
Georgia	Ga. Code Ann. §§ 15-12-125; 15-12-165	15	15	9	9	3	3

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Hawaii	Haw. Rev. Stat. § 635-30	N/A		12/ 3[e]	12/ 3	3	3
Idaho	Idaho Code Ann. § 19-2016	10	10	10/ 6[f]	10/ 6	6	6
Illinois	Ill. Sup. Ct. R. 434(d)	14	14	7	7	5	5
Indiana	Ind. Code §§ 35-37-1-3; 35-37-1-4	20	20	10/ 5[g]	10/ 5	5	5
Iowa	Iowa R. Crim. P. 2.18(9)	N/A		10/ 6[h]	10/ 6	4	4
Kansas	Kan. Stat. Ann. § 22-3412(a)	12	12	12/ 8/6[i]	12/ 8/6	3	3
Kentucky	Ky. R. Crim. P. 9.40	8	8	8	8	3	3
Louisiana	La. Code Crim. Proc. art. 799	12	12	12/ 6[j]	12/ 6	6	6
Maine	Me. R. Crim. P. 24(c)	N/A		10/ 8[k]	10/ 8	4	4
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 8.420	10	20	10/ 5/ 4[l]	20/ 10/ 4	4	4
Massachusetts	Mass. R. Crim. P. 20(c)	N/A		12/ 4[m]	12/ 4	4	4
Michigan	Mich. Comp. Laws §§ 768.12, 768.13	N/A		12/ 5[n]	12/ 5	5	5

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Minnesota	Minn. R. Crim. P. 26.02 subd. 6	N/A		9/ 3[o]	15/ 5	3	5
Mississippi	Miss. Code Ann. § 99-17-3	12	12	6	6	6	6
Missouri	Mo. Rev. Stat. § 494.480(2)	9	9	6	6	2	2
Montana	Mont. Code Ann. § 46-16-116	8	8	6/ 3[p]	6/3	6/3	6/3
Nebraska	Neb. Rev. Stat. § 29-2005	12	12	12/ 6/ 3[q]	12/ 6/ 3	3	3
Nevada	Nev. Rev. Stat. Ann. § 175.051	8	8	8/4[r]	8/4	4	4
New Hampshire	N.H. Rev. Stat. Ann. §§ 606:3, 606:4, 606:9	10	20	15/ 3[s]	15/ 3	2	2
New Jersey	N.J. Stat. Ann. § 2B:23-13	N/A		12/ 10[t]	20/ 10	10	10
New Mexico	N.M. Dist. Ct. R. Crim. P. 5-606(D)	16	24	8/ 3[u]	12/ 5	3	5
New York	N.Y. Crim. Proc. Law § 270.25	20	20	20/ 15/ 10[v]	20/ 15/ 10	10	10
North Carolina	N.C. Gen. Stat. § 15A-1217	14	14	6	6	6	6
North Dakota	N.D. R. Crim. P. 24(b)(1)	N/A		10/ 6/ 4[w]	10/ 6/ 4	6/4	6/4

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Ohio	Ohio Rev. Code Ann. § 2945.21	12	12	4	4	3	3
Oklahoma	Okla. Stat. tit. 22. § 655	9	9	9/5[x]	9/5	3	3
Oregon	Or. Rev. Stat. § 136.230	12	12	12/ 6/ 3[y]	12/ 6/ 3	3	3
Pennsylvania	Pa. R. Crim. P. 634	20	20	7	7	5	5
Rhode Island	R.I. Super. R. Crim. P. 24(b)	N/A		6	6	3	3
South Carolina	S.C. Code Ann. § 14-7-1110	5	10	5	10/ 5[z]	5	5
South Dakota	S.D. Codified Laws § 23A-20-20	20	20	20/ 10[aa]	20/ 10	3	3
Tennessee	Tenn. Code Ann. § 40-18-118	15	15	8	8	3	3
Texas	Tex Code Crim. Proc. art. 35.15	15	15	10	10	5	5
Utah	Utah R. Crim. P. 18(d)	10	10	4	4	3	3
Vermont	Vt. Stat. Ann. tit. 12. § 1941	N/A		6	6	6	6
Virginia	Va. Code Ann. § 19.2-262	4	4	4	4	3	3

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Washington	Wash. Sup. Ct. Crim. R. 6.4(e)(1)	12	12	6	6	3	3
West Virginia	W. Va. Code § 62-3-3; W. Va. R. Crim. P. 24(b)(1)(B)	N/A		2	6	4	4
Wisconsin	Wis. Stat. § 972.03	N/A		6/ 4[bb]	6/ 4	4	4
Wyoming	Wyo. Stat. § 7-11-103	12	12	8	8	4	4

[a] In each state, the table entries reflect those peremptory challenges available in the highest trial court, if there is a difference in the number of challenges among a jurisdiction's courts. For instance, in Texas, the state and the defendant are entitled to 5 peremptory challenges in the district court for misdemeanors, but only 3 for misdemeanors tried at the county court. Tex. Code Crim. Proc. art. 35.15(c). The table reflects only the number for the district court level in Texas and similar levels in other states.

[b] In California, each side is allotted 20 peremptory challenges in trials for offenses punishable by imprisonment in the state prison for life. If the offense charged is punishable with a maximum term of imprisonment of 90 days or less, each side is entitled to 6 peremptory challenges. For any other offense, each side is allotted 10 peremptory challenges.

[c] In Connecticut, each side receives 15 peremptory challenges at trials for felonies which are punishable by life imprisonment.

[d] In Florida, 10 peremptory challenges are allotted to each side at trials for offenses punishable by life imprisonment.

[e] In Hawaii, each side receives 12 peremptory challenges when the offense being tried is punishable by life imprisonment.

[f] In Idaho, if a crime is punishable by life imprisonment, each side receives 10 strikes.

[g] In Indiana, 10 peremptory challenges are allotted for each side when the crime charged is murder (and the prosecution is not seeking the death penalty), or a Class A, B, or C felony. All other offenses are allotted 5 strikes per side.

[h] In Iowa, if the offense is a Class A felony, each side receives 10 strikes. Parties in other felony cases receive 6 strikes.

[i] In Kansas, 12 peremptory challenges are available in the most severe felony trials, 8 in the next levels, and 6 in all other felony trials.

[j] In Louisiana, in trials for offenses punishable by death or "necessarily by imprisonment at hard labor," each side is allotted 12 peremptory challenges. In all other trials, 6 peremptory challenges are allotted.

[k] In Maine, if the crime charged is murder, the parties are allotted 10 strikes. Parties in trials of class A, B, and C crimes are allotted 8.

[l] In Maryland, the state is allotted 10 and the defendant is allotted 20 peremptory challenges for all crimes punishable by the death penalty or life imprisonment. When the potential sentence is at least 20 years, the state is allotted 5 and the defendant is allotted 10 peremptory challenges. In every other criminal trial, each party is allotted 4 peremptory challenges.

[m] In Massachusetts, in trials for offenses punishable by life imprisonment, the Commonwealth and each defendant are allotted 12 peremptory challenges.

[n] In Michigan, in trials for crimes punishable by life imprisonment each side receives 12 peremptory challenges.

[o] In Minnesota, at trials for offenses punishable by life imprisonment the defendant is allotted 15 and the state is allotted 9 peremptory challenges.

[p] In Montana, each side is allotted 6 peremptory challenges when the trial is by a 12-person jury; 3 peremptory challenges are allotted to each side when the trial is by a 6-person jury.

[q] In Nebraska, in a trial for any crime punishable with death, or imprisonment for life, each side receives 12 peremptory challenges; in trials for any offense that may be punishable by imprisonment for a term exceeding 18 months and less than life, each side receives 6 peremptory challenges; and in all other criminal trials, each side receives 3.

[r] In Nevada, each side receives 8 peremptory challenges in trials for crimes punishable by life imprisonment.

[s] In New Hampshire, 15 peremptory challenges are allotted for each side in trials for murder in the first degree.

[t] In New Jersey, in trials for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree, or perjury the defendant receives 20 and the state 12 peremptory challenges. In all other trials, each side receives 10 peremptory challenges.

[u] In New Mexico, if the offense is punishable by life imprisonment, the state receives 8 challenges and the defendant receives 12.

[v] In New York, each side receives 20 peremptory challenges if the highest crime charged is a class A felony, 15 if the highest crime charged is a class B or class C felony, and 10 in all other cases.

[w] In North Dakota, each side is entitled to 6 challenges when a 12-person jury is to serve, and 4 challenges when a 6-person jury is impaneled. Each side receives 10 peremptory challenges when the offense charged is an AA felony.

[x] In Oklahoma, parties receive 9 peremptory challenges in all first-degree murder trials.

[y] In Oregon, if the jury is comprised of more than 6 jurors, the parties are entitled to 6 peremptory challenges. In trials before

6 jurors, the parties are entitled to 3 challenges. If the trial is for an offense punishable by life imprisonment, the parties are entitled to 12 challenges.

[z] In South Carolina, defendants receive 10 peremptory challenges in trials for murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as grand larceny, perjury, or forgery.

[aa] In South Dakota, parties are entitled to 20 peremptory challenges in trials for Class A, B, or 1 felony offenses.

[bb] In Wisconsin, parties at trials for offenses punishable by life imprisonment receive 6 challenges.

AMICUS CURIAE BRIEF

114

No. 07-9995

Supreme Court, U.S.
FILED
DEC 12 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

ABIGAIL K. HEMANI
Counsel of Record
ANNE E. RAILTON
SARAH M. BURLESON
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
(212) 813-8800

KEVIN P. MARTIN
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for *Amicus Curiae*

December 12, 2008

BOTH 48 D7P2

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Peremptory Challenge Has Long Been Instrumental in Protecting Criminal Defendants' Constitutional Right to a Fair Trial by an Impartial Jury 4

II. The Improper Denial of a Defendant's Peremptory Challenge Unconstitutionally Tips the Scales in Favor of the Prosecution. 15

III. The Improper Denial of a Defendant's Peremptory Challenge Cannot Be Deemed Harmless 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 20

Davis v. *Georgia*,
429 U.S. 122 (1976) 3, 20

Edmonson v. *Leesville Concrete Co.*,
500 U.S. 614 (1991) 18

Fay v. *New York*,
332 U.S. 261 (1947 ..... 3, 15

Georgia v. *McCollum*,
505 U.S. 42 (1992) ..... *passim*

Gray v. *Mississippi*,
481 U.S. 648 (1987) 20

Hayes v. *Missouri*,
120 U.S. 68 (1887) 16, 17

Holland v. *Illinois*,
493 U.S. 474 (1990) 5, 15, 16

McIlwain v. *United States*,
464 U.S. 972 (1983) 20

Peters v. *Kiff*,
407 U.S. 493 (1972) 17

Pointer v. *United States*,
151 U.S. 396 (1894) 2, 4, 10

Ross v. *Oklahoma*,
487 U.S. 81 (1988) ..... *passim*

Stilson v. *United States*,
250 U.S. 583 (1919) 15

Swain v. *Alabama*,
380 U.S. 202 (1965) ..... *passim*

United States v. *Gonzalez-Lopez*,
548 U.S. 140 (2006) 20

United States v. *Martinez-Salazar*,
528 U.S. 304 (2000) ..... *passim*

United States v. *McVeigh*,
918 F. Supp. 1467 (W.D. Okla. 1996) 11

Vasquez v. *Hillery*,
474 U.S. 254 (1986) 3, 20

Witherspoon v. *Illinois*,
391 U.S. 510 (1968) 3, 15, 16

STATUTES:

28 U.S.C. § 1870 ..... 8, 9

Act of Apr. 30, 1790,
ch. 9, § 30, 1 Stat. 112 4

Act of March 3, 1865,
ch. 86, § 2, 13 Stat. 500 5

Act of June 8, 1872,
ch. 333, § 2, 17 Stat. 282 ..... 4, 5

FEDERAL RULES:

Fed. R. Crim. P. 24 ..... *passim*

Ill. S. Ct. Rule 434 17

OTHER AUTHORITIES:

Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*,
95 Ill. B.J. 474 (Sept. 2007) 13, 14

4 William Blackstone, *Commentaries on the Laws of England* (1769) 4, 5

Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1965) 12

Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575 (1985) 11, 12

3 Edward Coke, *Institutes of the Laws of England* (1644) 4

Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* Inside the Juror: The Psychology of Juror Decision Making 42 (Reid Hastie ed., Cambridge Univ. Press 1993) 13, 14

Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 Law & Contemp. Probs. 116 (1980) 11, 12

Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection*, 17 Ohio N.U. L. Rev. 229 (1990) 14

Valerie P. Hans & Alayana Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.–Kent L. Rev. 1179 (2003) 12

Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 J. of Applied Soc. Psychol. 2010 (2008)..... 13

Joel D. Leiberman & Bruce D. Sales, *Scientific Jury Selection* 75 (2007)..... 14

Tamara Loomis, *Business Scandals Rock Juror Attitudes*, N.Y. L.J. Oct. 16, 2002, at A1..... 14

James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 Law & Hum. Behav. 507 (1994)..... 12

William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391 (Fall, 2001)..... 4, 5, 6

John Proffatt, Treatise on Trial By Jury: Including Questions of Law and Fact (Wm. S. Hein Publishing 1986) (1877) 5

David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, State Court Organization, 2004 (2006)..... 6, 7, 8, 9

Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 Judicature 185 (1996)..... 11

V. Hale Starr & Mark McCormick, Jury Selection 46 (3d ed. 2001)..... 10

Brian W. Wais, Note, *Actions Speak Loader than Words: Revisions to the Batson Doctrine and Peremptory Challenges in the Wake of Johnson v. California and Miller-El v. Dretke*, 45 Brandeis L.J. 437 (2007)..... 10

Mitzi S. White, *The Nonverbal Behaviors in Jury Selection*, 31 Crim. L. Bull. 414 (1995)..... 14

Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491 (1978)..... 12, 14

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,000 attorneys and nearly 40,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. NACDL submits this brief in the hope that it may aid the Court in its consideration of the fundamental constitutional and societal interests that are implicated when a criminal defendant is improperly denied the right to exercise a peremptory challenge.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case presents the question of whether the erroneous denial of a defendant's peremptory challenge, resulting in the sitting of a juror who otherwise would have been excused, requires automatic reversal or may be subject to a harmless error analysis. In light of the long-standing and significant role of the peremptory challenge in ensuring a defendant's right to a fair trial by an impartial jury, the answer to this question can only be that automatic reversal is mandated.

The peremptory challenge has long been a critical mechanism for protecting the right of criminal defendants, as guaranteed by the Sixth and Fourteenth Amendments, to a fair trial by an impartial jury. The defendant's right to challenge peremptorily dates back to British common law, and each and every jurisdiction within the United States has long-granted, and presently continues to grant, this right of challenge to the defense. The significance of the peremptory challenge is confirmed not only by its history, but also by empirical data, which suggests that potential jurors routinely fail—either consciously or subconsciously to admit their biases. Accordingly, the peremptory challenge is not only a necessary supplement to the challenge for cause, but is "'one of the most important rights secured to the accused.'" *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) (quoting *Pointer* v. *United States*. 151 U.S. 396, 408 (1894)).

This Court has commented on occasion that the peremptory challenge, although a "means to achieve the constitutionally required end of an impartial jury," is not itself "of a constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307

(2000) (quoting *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988)). Regardless of whether peremptory challenges are constitutionally mandated, however, once a state determines to implement them, it plainly may not do so in a manner that "stack[s] the deck against the [defendant]" or otherwise promotes "a tribunal 'organized to convict.'" *Witherspoon* v. *Illinois*, 391 U.S. 510, 521, 523 (1968) (quoting *Fay* v. *New York*, 332 U.S. 261, 294 (1947)). Accordingly, where, as here, a trial court tilts the scales of the jury selection process in favor of the prosecution by improperly refusing to honor a defendant's peremptory challenge and empanelling a juror over his objection, such action necessarily violates the defendant's constitutional right to a fair trial by an impartial jury.

To be sure, the question presented in this case is not simply whether the improper refusal to honor a defendant's peremptory challenge is unconstitutional, but whether it requires automatic reversal. NACDL agrees with the Petitioner that such error can never be deemed harmless, and that reversal is therefore always required. Where, as here, "a petit jury has been selected upon improper criteria," this Court has repeatedly "required reversal of the conviction because the effect of the violation cannot be ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (citing *Davis* v. *Georgia*, 429 U.S. 122 (1976) (*per curiam*)); see also *Swain*, 380 U.S. at 219 (stating that "a denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice"). As in these other cases, the impact of an improperly empanelled juror upon the deliberation process and upon the ultimate verdict—is unknowable. Accordingly, the

error cannot be deemed harmless, and reversal must be automatic.

ARGUMENT

I. The Peremptory Challenge Has Long Been Instrumental in Protecting Criminal Defendants' Constitutional Right to a Fair Trial by an Impartial Jury.

1. A defendant's right to exercise peremptory challenges has long been regarded as a vital tool for ensuring a fair trial by an impartial jury. The peremptory challenge is "part of our common law heritage," dating back at least to the time of Blackstone. *Martinez-Salazar*, 528 U.S. at 311 (citing 4 William Blackstone, Commentaries *346 48 (1769)). A defendant's right to challenge peremptorily was extolled in England as necessary to ensure "an indifferent trial * * * which is required by law." *Pointer*, 151 U.S. at 408 (quoting Coke, 3 Co. Inst. 27, c. 2) ("'[T]o bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.'").

Following British common law, U.S. jurisdictions have long-afforded criminal defendants the right to exercise peremptory challenges. In the federal system, peremptory challenges were authorized by statute for treason and other capital offenses as early as 1790. See *Swain*, 380 U.S. at 214 15 (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119). In 1872, Congress expanded this right, expressly mandating that defendants receive peremptory challenges in all felony and misdemeanor cases. See *Swain*, 380 U.S. at 214 n.14 (citing Act of June 8, 1872, ch. 333, § 2, 17 Stat. 282); see also William T.

Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1414 15 (Fall, 2001).

As in the federal system, states have long afforded defendants peremptory challenges. As explained by this Court, "[t]he defendant's right of challenge [in the states] was early conferred by statute." *Swain*, 380 U.S. at 215. Indeed, by 1790, most states had codified the right to challenge for those charged with capital offenses. See Pizzi, *supra*, at 1415–16. By the mid-1800s numerous states had also granted peremptory challenges to criminal defendants charged with noncapital felonies and misdemeanors, either by statute or through common law. John Proffatt, Treatise on Trial By Jury: Including Questions of Law and Fact 209–11 (Wm. S. Hein Publishing 1986) (1877).[2]

[2] In contrast to this long-standing precedent of affording peremptory challenges to criminal defendants, the prosecution's ability to challenge has only evolved more recently. At the time of Blackstone, the "'privilege[] of peremptory challenges, though granted to the prisoner, [wa]s denied to the king.'" *Holland* v. *Illinois*, 493 U.S. 474, 519 n.15 (1990) (Marshall, J., dissenting) (quoting 4 William Blackstone, Commentaries *346–347 (1769)). In the United States, it was not until 1865 that Congress enacted legislation affording the right of challenge to federal prosecutors. See Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500. Likewise, most states did not enact laws extending the right of challenge to the prosecution until the second half of the Nineteenth Century. See Pizzi, *supra*, at 1415–16. Indeed, "the two most populous States in the Nation's first century, New York and Virginia, did not permit the prosecutor peremptory challenges until 1881 and 1919 respectively." *Holland*, 493 U.S. at 519 (Marshall, J., dissenting) (citations omitted).

As has been the case throughout recent history, every jurisdiction in the United States presently affords criminal defendants the right to exercise peremptory challenges. See Pizzi, *supra*, at 1416. Although the number and applicability of peremptory challenges varies from one jurisdiction to another (and within jurisdictions for different types of charges), several patterns emerge which suggest that the primary purpose of the peremptory challenge is to protect a criminal defendant's constitutional right to a fair trial by an impartial jury.

First, in many jurisdictions, the prosecution is granted considerably fewer peremptory challenges than the defense. *Ibid.* For example, Federal Rule of Criminal Procedure 24(b)(2) grants non-capital felony defendants 10 peremptory challenges, while allowing the government only 6.[3] Likewise, numerous states afford more challenges to the defendant than to the government, at least in certain types of cases. See David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, State Court Organization, 2004, 228–31, Table 41 (2006) (collecting rules regarding the use of peremptory challenges in all U.S. jurisdictions), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf.[4] No

[3] In capital cases and in misdemeanor cases, the government and the defendant are entitled to equal numbers of peremptory challenges. See Fed. R. Crim. P. 24(b)(1),(3).

[4] States giving more peremptory challenges to the defense include: Arkansas (two more challenges than the government in capital and felony cases); Delaware (eight more challenges than the government in capital cases); Georgia (double the number of government challenges in capital, felony, and misdemeanor

(*continued next page*)

criminal justice system within the United States affords more peremptory challenges to the prosecution than to the defense, under any circumstances. *Ibid.*

Second, defendants are almost universally granted additional peremptory challenges in more serious cases. Federal courts and most state courts provide substantially more challenges to defendants charged with a felony than to those facing only misdemeanor charges, and substantially more challenges to defendants charged with a capital crime than to those facing lesser felony charges. See Fed. R. Crim. P. 24(b) (granting capital defendants 20 peremptory challenges, other felony defendants 10 peremptory challenges, and misdemeanor defendants 3 peremptory challenges); Rottman & Strickland, *supra*, 228–31, Table 41 (evidencing that 40 states afford more peremptory challenges to some or all felony defendants than to misdemeanor defendants, and that 35 states afford additional peremptory challenges to defendants charged with a capital crime). Indeed, many jurisdictions afford at

cases); Maryland (double the number of government challenges in capital and felony cases); Minnesota (six more challenges than the government where defendant faces life imprisonment; two more in all other felony and misdemeanor cases); New Hampshire (double the number of government challenges in capital cases); New Jersey (eight more challenges than the government in capital cases and for specified other serious crimes); New Mexico (four more challenges than the government in capital cases; two more in felony and misdemeanor cases); South Carolina (double the number of government challenges in capital and felony cases); and West Virginia (three times the number of government challenges in felony cases). See Rottman & Strickland, *supra*, 228, Table 41.

least twice as many peremptory challenges to defendants charged with more serious crimes. *Ibid.*[5]

Third, in virtually every jurisdiction within the United States, the number of peremptory challenges afforded to criminal defendants exceeds the number granted to parties to a civil action. *Swain*, 380 U.S. at 217. In federal cases, while criminal defendants facing felony charges receive either ten or twenty peremptory challenges, see Fed. R. Crim. P. 24(b), in civil matters each party receives only three, see 28

[5] States granting felony defendants at least twice the number of challenges available in misdemeanor cases include: Alabama; Alaska; Arkansas; California (for felonies punishable by life imprisonment); Connecticut; District of Columbia; Florida; Georgia; Idaho (for felonies punishable by life imprisonment); Indiana; Kansas; Kentucky; Maine; Maryland; Massachusetts (for felonies punishable by life imprisonment); Michigan (for felonies punishable by life imprisonment); Minnesota (for felonies punishable by life imprisonment); Missouri; Nebraska; New Hampshire (for defendants charged with first degree murder); New Jersey (double the number of misdemeanor challenges for the *defendant only*); New York (for Class A felonies); Rhode Island; South Dakota; Tennessee; Texas; Washington; and Wyoming. States granting capital defendants at least twice the number of challenges available in non-capital felony cases include: Alabama; California (as compared to felonies not punishable by life imprisonment); Colorado; Connecticut (as compared to felonies not punishable by life imprisonment); Delaware; Illinois; Indiana; Kansas (as compared to most felonies); Louisiana (as compared to felonies punishable "without hard labor"); Maryland; Mississippi; Nebraska; New Hampshire (as compared to all felonies except first degree murder); New Mexico; New York (as compared to all but Class A, B, or C felonies); North Carolina; Oregon; Pennsylvania; South Dakota (as compared to felonies not punishable by life imprisonment); Utah; Washington. Rottman & Strickland, *supra*, 228–31, Table 41.

U.S.C. § 1870. Similarly, 46 of the 50 states grant more challenges to felony defendants than to parties in civil cases. Rottman & Strickland, *supra*, at 228–31, Table 41.[6]

Finally, for trials involving more than one criminal defendant, the vast majority of U.S. jurisdictions provide a mechanism for affording the defense additional peremptory challenges. See Fed. R. Crim. P. 24(b) (authorizing courts to grant additional challenges to multiple defendants and leaving it up to the defendants whether to split their challenges or exercise them jointly); Rottman & Strickland, *supra*, 228–31, Table 41 (noting that at least 40 of the 50 states afford additional peremptory challenges to the defense in cases involving multiple defendants).[7]

[6] States granting felony defendants more peremptory challenges than parties to a civil case include: Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii (for felonies punishable by life imprisonment); Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana (for felonies punishable "with hard labor"); Maine; Maryland; Massachusetts (for felonies punishable by life imprisonment); Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Hampshire (for first degree murder); New Jersey; New York; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington; West Virginia; Wisconsin; Wyoming.

[7] States granting additional peremptory challenges for multiple defendants include: Alabama; Alaska; Arizona; California; Colorado; Delaware; Florida; Georgia; Idaho; Illinois; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; North

(*continued next page*)

In sum, "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury" and "'one of the most important rights secured to the accused.'" *Swain*, 380 U.S. at 219 (quoting *Pointer*, 151 U.S. at 408).

2. The fact that each and every U.S. jurisdiction has embraced the use of peremptory challenges is not surprising: Evidence suggests that such challenges are, in fact, necessary to weed out jurors who cannot be impartial.

Although courts in every jurisdiction may excuse "for cause" any potential juror who openly expresses a lack of partiality, see, *e.g.*, Brian W. Wais, Note, *Actions Speak Loader than Words: Revisions to the Batson Doctrine and Peremptory Challenges in the Wake of Johnson v. California and Miller-El* v. *Dretke*, 45 Brandeis L.J. 437, 437–38 (2007) (citing V. Hale Starr & Mark McCormick, Jury Selection 46 (3d ed. 2001)), the for-cause challenge does not eliminate those members of the jury pool who are either unwilling or unable to admit their bias. As explained by Chief Judge Richard P. Matsch in connection with the Timothy McVeigh case:

> The existence of * * * prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or

Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Washington; West Virginia; Wisconsin; Wyoming.

> discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence.

United States v. *McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996). In other words, each person's individual life circumstances may impede either consciously or subconsciously—his or her ability to objectively consider the evidence presented. Because life circumstances that affect partiality do not always translate into cause for dismissal, the peremptory challenge is a vital mechanism for ensuring that defendants receive a fair trial, free from juror bias.[8]

Studies have shown that two-thirds of the individuals on most jury panels in criminal cases are biased in some way against the accused. See, *e.g.*, Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575, 580 (1985) (citing Herald P.

[8] In a 1995 survey, more than eighty-five percent of federal district court judges agreed that peremptory challenges make a "beneficial contribution to the attainment of fair trials and just outcomes." Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 Judicature 185, 186 (1996). Surveyed judges recognized that peremptory challenges are useful for eliminating potential jurors who do not "manifest the overt biases necessary to support a challenge for cause," but who are nevertheless unable to remain impartial. *Ibid.* at 188. Additionally, as explained by Justice Souter, because "[t]he resolution of juror-bias questions is never clear cut * * * it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point." *Martinez-Salazar*, 528 U.S. at 319 (Souter, J., concurring).

Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 Law & Contemp. Probs. 116, 122 (1980)). Indeed, as many as twenty five percent of jurors begin their service with the belief that the defendant must be guilty simply because he was charged. See Covington, *supra*, at 580 (citing Fahringer, *supra*, at 123). Nevertheless, jurors regularly fail, either intentionally or unintentionally, to openly acknowledge such prejudice during the *voir dire* process. See, *e.g.*, Valerie P. Hans & Alayana Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.–Kent L. Rev. 1179, 1187 (2003) (citing Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503, 505 (1965) (finding that jurors intentionally withhold information suggesting bias)); James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 Law & Hum. Behav. 507, 521–22 (1994) (finding that jurors are often unaware of subconscious biases); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491, 531 (1978) (concluding that "[p]otential jurors may hide their prejudices from the examiner, either consciously or unconsciously"). Accordingly, many jurors that do, in fact, harbor bias against the defendant will not be excused for cause.[9]

[9] This problem was expressly acknowledged by Justice Thomas in *Georgia* v. *McCollum*, 505 U.S. 42 (1992). As

(*continued next page*)

In order to remedy this problem, defense counsel must ascertain indirect evidence of juror partiality and make use of his or her peremptory challenges accordingly. Although the beliefs, attitudes and experiences that may correlate with juror bias vary from case to case, studies suggest several categories of individuals that are more likely to disfavor the accused.[10] These categories include those who have favorable views of law enforcement; those who have a high degree of confidence in the criminal justice system; those with a desire for order, well-defined rules, and authoritative leadership; those who are in favor of capital punishment; those who are politically conservative; and those who have been exposed to media coverage of the case. See, *e.g.*, Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 J. Applied Soc. Psychol. 2010, 2019, 2031 (2008); Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95

explained by Justice Thomas, absent the opportunity to consider race in exercising peremptory challenges, defendants will be unable to "protect[] themselves" against the "racial animus" of those jurors who do not "actually admit prejudice during *voir dire*." *Ibid.* at 61–62 (Thomas, J., concurring in judgment).

[10] Scholars have theorized that juror beliefs, attitudes and experiences influence three components of the deliberative process: the evaluation of witnesses, the inferences made that go beyond evidence presented, and the nature of the juror's "personal standard-of-proof" for conviction. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* Inside the Juror: The Psychology of Juror Decision Making 42, 58 (Reid Hastie ed., Cambridge Univ. Press 1993).

Ill. B.J. 474, 477 (Sept. 2007); Joel D. Lieberman & Bruce D. Sales, *Scientific Jury Selection* 75, 80 (2007); Tamara Loomis, *Business Scandals Rock Juror Attitudes*, N.Y. L.J. Oct. 16, 2002, at A1; Ellsworth, *supra*, at 46, 57; Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 Ohio N.U. L. Rev. 229, 245, 248 (1990). Additionally, the mannerisms, tone and demeanor of individual panel members may be useful to defense counsel in evaluating possible juror bias. See, *e.g.*, Mitzi S. White, *The Nonverbal Behaviors in Jury Selection*, 31 Crim. L. Bull. 414, 428 14 (1995).

Of course, each of these considerations is necessarily an imperfect proxy for determining partiality. Nevertheless, studies suggest that the exercise of peremptory challenges by defense counsel does, in fact, reduce the number of seated jurors who are predisposed to convict. See, *e.g.*, Zeisel & Diamond, *supra*, at 517–19 (finding that, "on the average, defense attorneys shifted in their favor the proportion of not guilty votes in the venire" through the exercise of peremptory challenges).[11] Because at

[11] In this study conducted by Zeisel and Diamond, peremptorily excused jurors from twelve federal criminal trials were asked to remain as shadow jurors. The researchers then compared the initial votes cast by the jury members prior to deliberation with those cast by the group of individuals who would have been seated, absent the peremptory challenges. In five of the twelve cases, although the actual jury voted to acquit, the votes cast by the mock jurors suggested that convictions would have been far more likely if no peremptory challenges had been exercised. *Ibid.* at 507–08.

least some of these challenged jurors are likely to harbor undisclosed bias sufficient to give rise to constitutional concerns, the peremptory challenge plays an important role "in reinforcing a defendant's right to trial by an impartial jury." *Martinez-Salazar*, 528 U.S. at 311.

II. The Improper Denial of a Defendant's Peremptory Challenge Unconstitutionally Tips the Scales in Favor of the Prosecution.

This Court has made clear that the constitutional guarantee of an impartial jury "deprives the State of the ability to 'stack the deck' in its favor" during the jury selection process. *Holland* v. *Illinois*, 493 U.S. 474, 481 (1990). Thus, whatever procedures a state may put in place for jury selection, it must ensure that "a fair hand is dealt" to the defense. *Ibid.* A state may not conduct jury selection in a manner that "stack[s] the deck against the [defendant]" or otherwise promotes "a tribunal 'organized to convict.'" *Witherspoon* v. *Illinois*, 391 U.S. 510, 521, 523 (1968) (quoting *Fay* v. *New York*, 332 U.S. 261, 294 (1947)); see also *Holland*, 493 U.S. at 481 (noting constitutional requirement that "in the process of selecting the petit jury the prosecution and defense will compete on an equal basis").

This Court has commented on occasion that peremptory challenges, although a "means to achieve the constitutionally required end of an impartial jury," are not themselves "of constitutional dimension." *Martinez-Salazar*, 528 U.S. at 307 (quoting *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988)); see also *Stilson* v. *United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant

peremptory challenges to defendants in criminal cases.").[12] While the states may not be constitutionally required to grant peremptory challenges, however, once they determine to do so, they must ensure that "[b]etween [the defendant] and the state the scales are [] evenly held." *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887); *Swain*, 380 U.S. at 220 (same); cf. *Holland*, 493 U.S. at 483 (noting with respect to peremptory challenges that "neither the defendant nor the State should be favored"); *Witherspoon*, 391 U.S. at 520 n.15 (holding that, while the state *could have* mandated capital punishment for all persons convicted of certain crimes, once it chose to submit this matter to a jury, it was constitutionally required to ensure that the sentencing jury was selected in an even-handed manner).[13]

Thus, a defendant's constitutional right to a fair trial by an impartial jury may still be "denied or

[12] Although acknowledging this past precedent, this Court has recently stated that "[t]he constitutional phrase 'impartial jury' must surely take its content from th[e] unbroken tradition" of the peremptory challenge and, therefore, that "[o]ne could plausibly argue * * * that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges." *Holland*, 493 U.S. at 481–82 (emphasis in original). Although NACDL agrees with this argument, because the Court need not reexamine its past precedent in order to a find constitutional error in this case, there is no need to expound upon it.

[13] Of course, to the extent that the scales may be tipped, the Constitution requires that they tilt in the defendant's favor. See, *e.g.*, *McCollum*, 505 U.S. at 68 (O'Connor, J., dissenting) ("The concept that the government alone must honor constitutional dictates [] is a fundamental tenet of our legal order" and "is particularly so in the context of criminal trials").

impaired [] if the defendant does not receive that [for] which state law provides." *Ross*, 487 U.S. at 89, 91. In this case, by improperly denying the Petitioner his lawful right to exclude a particular juror, the trial court tipped the scales of the jury selection process in favor of the state. Under Illinois law, the prosecutor and the Petitioner were each entitled to peremptorily challenge any seven panel members. See Ill. S. Ct. Rule 434(d). Although the state retained its authority to excuse the seven potential jurors that it considered most likely to harbor prejudice against it, by ordering Ms. Gomez to be seated, the trial court denied Mr. Rivera this same opportunity. The lack of "procedural parity" created by the Court's improper reverse-*Batson* ruling thus unconstitutionally "tilt[ed]" the process against the defendant, *Ross*, 487 U.S. at 94, 97 (Marshall, J., dissenting), creating a situation in which, "[b]etween [the defendant] and the state the scales [were not] evenly held," *Hayes*, 120 U.S. at 70.[14]

To be sure, this Court has on one prior occasion limited a defendant's constitutional right to make use of the peremptory challenges afforded him: In *Georgia* v. *McCollum*, 505 U.S. 42 (1992), this Court ruled that a defendant may not exercise peremptory challenges for the purpose of racial discrimination. But in *McCollum* this Court was faced with a

[14] Whether or not Ms. Gomez was, in fact, biased against Petitioner is of no import: "[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) (citing cases).

situation in which the defendant's peremptory right came into conflict with the potential jurors' equal protection right not to be excluded from jury service on the basis of race. This Court chose to prioritize the equal protection right, explaining that "if race stereotypes are the price for acceptance of a jury panel as fair, * * * such a price is too high to meet the standard of the Constitution." *Ibid.* at 57 (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)). But the *McCollum* Court in no way suggested that the Constitution fails to protect a defendant's right to even-handedness in the exercise of peremptory challenges where, as here, the reverse-*Batson* ruling was made in error and, therefore, no equal protection right is at stake.[15]

Nor is this case analogous to *Ross* and *Martinez-Salazar*, two cases in which this Court declined to find constitutional or statutory error where the trial court's erroneous denial of a for-cause challenge compelled the defendant to challenge peremptorily, "thereby reducing his allotment of peremptory challenges by one." *Martinez-Salazar*, 528 U.S. at 315. In those cases, the Court expressly rested its decision on the fact that the defendants had a choice either to use a peremptory challenge to remove the juror that should have been excused for cause, or to "let[] [him] sit on the petit jury and, upon conviction, pursu[e] a Sixth Amendment challenge on appeal." *Ibid.* The Court reasoned that, while this may have

[15] Moreover, at the time it decided *McCollum*, this Court had already ruled in *Batson* that the state may not exercise peremptory challenges on the basis of racial discrimination. Accordingly, the decision in *McCollum* in no way placed the defendant at a disadvantage vis-à-vis the state.

been a difficult choice, "[á] hard choice is not the same as no choice." *Ibid.* Because each defendant (1) chose to challenge the biased juror, and (2) made no claim of partiality with respect to "the jurors who actually sat," *Ross*, 487 U.S. at 84, the Court held that each had received "all he was entitled to under [applicable law]," *Martinez-Salazar*, 528 U.S. at 315.

Unlike the defendants in *Ross* and *Martinez-Salazar*, Mr. Rivera had no choice: The trial judge refused to let him exercise a peremptory challenge against Ms. Gomez and, instead, insisted that she sit on the jury. Accordingly, Mr. Rivera did, in fact, make a claim of partiality with respect to a juror "who actually sat," *Ross*, 487 U.S. at 84, and the court's refusal to honor his challenge did, in fact, deprive him of "all he [wa]s entitled to" under the law, *Martinez-Salazar*, 528 U.S. at 315.

In sum, even if peremptory challenges are not expressly mandated by the Constitution, once a state elects to grant criminal defendants the right to challenge peremptorily, it may not constitutionally withhold or impede such challenges in a manner that tilts the scales of the jury selection process in favor of the prosecution. Accordingly, the trial court's refusal to honor one of Mr. Rivera's state-granted challenges violated his right to an impartial jury and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments.

III. The Improper Denial of a Defendant's Peremptory Challenge Cannot Be Deemed Harmless.

As explained at length by Petitioner, automatic reversal is required in this case because the

improper empanelling of a juror is a "structural defect" that "'affec[ts] the framework within which the trial proceeds,' and [is] not 'simply an error in the trial process itself.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 49 (2006) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309–10 (1991).

Even if the error in this case could theoretically be subjected to harmless error analysis, however, such an analysis could not be implemented in practice. "[W]hen a petit jury has been selected upon improper criteria," this Court has repeatedly stated that reversal is necessary "because the effect of the violation cannot be ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (citing *Davis* v. *Georgia*, 429 U.S. 122 (1976) (*per curiam*)); see also *Gray* v. *Mississippi*, 481 U.S. 648, 666–68 (1987). This is true even where, as here, only one juror was improperly seated or excluded as a result of the error. See *Davis*, 429 U.S. at 122–23 (requiring automatic reversal where "one prospective juror had been excluded [improperly]"). As explained by Justice Marshall, "[g]iven the delicate dynamics of jury deliberations, it is simply impossible to know the effects that [one juror] had on her fellow jurors." *McIlwain* v. *United States*, 464 U.S. 972, 975–76 (1983) (Marshall, J., dissenting from denial of certiorari). Indeed, "one juror may be the difference between liberty and imprisonment." *Ibid.* at 975.

Nothing about this Court's decision in *Martinez-Salazar* alters this analysis. Although the majority in *Martinez-Salazar* questioned whether "a denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice," *Martinez-Salazar*, 528 U.S. at 316 n.4 (quoting *Swain*, 380 U.S. at 219) (alterations in

original), it did not, in fact, have occasion to decide that issue. Instead, *Martinez-Salazar* held that *no error* resulted where a defendant used up one of his peremptory challenges to remedy an erroneous denial of a for-cause challenge. Moreover, this Court made clear in *Martinez-Salazar* that, had the court's error "result[ed] in the seating of any juror who should have been dismissed * * *" that "circumstance would require reversal." *Martinez-Salazar*, 528 U.S. at 316 (citing *Ross*, 487 U.S. at 85). In other words, *Martinez-Salazar* actually confirms that where, as here, a particular juror is erroneously empanelled, the error cannot be deemed harmless, and reversal must be automatic.

CONCLUSION

The peremptory challenge has long-been considered a necessary tool for ensuring a criminal defendant's constitutional right to a fair trial by an impartial jury. The improper empanelling of a juror whom the defendant sought to challenge undermines this constitutional right by tilting the scales of the jury selection process in favor of the state. Because there is simply no way to determine how the wrongly empanelled juror may have affected deliberations and, ultimately, the verdict, the erroneous denial of a defendant's peremptory challenge necessitates automatic reversal.

Respectfully submitted,

Of Counsel:
BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

ABIGAIL K. HEMANI
Counsel of Record
ANNE E. RAILTON
SARAH M. BURLESON
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
(212) 813-8800

KEVIN P. MARTIN
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for Amicus Curiae

December 12, 2008

AMICUS CURIAE BRIEF

B629

Supreme Court, U.S.
FILED

JAN 28 2009

OFFICE OF THE CLERK

No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA, PETITIONER

v.

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Counsel of Record
MARGARET C. DAUN
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60622
312-558-5600

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

When a criminal defendant is erroneously denied a peremptory challenge to which he was entitled under state law, does the fact that the challenged juror was seated and participated in the trial constitute a "structural error" under the Due Process Clause that requires automatic reversal of the conviction?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

AND INTEREST OF AMICUS CURIAE 1

STATEMENT 3

ARGUMENT 4

I. Petitioner's argument seeks an unprecedented expansion of the concept of "structural error," extending it to include the deprivation of any *state law* right that impacts the jury's composition. 5

II. Accepting Petitioner's position would distort the incentives of the parties with respect to *Batson* and peremptory challenges and would create significant practical difficulties for prosecutors 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 4

Batson v. *Kentucky*,
476 U.S. 79 (1986) ..... *passim*

Connecticut v. *Johnson*,
460 U.S. 73 (1983) 10

Edmonson v. *Leesville Concrete Co.*,
500 U.S. 614 (1991) 6, 12

Frazier v. *United States*,
335 U.S. 497 (1948) 6, 7

Georgia v. *McCollum*,
505 U.S. 42 (1992) 5, 6, 12, 13

Gomez v. *United States*,
490 U.S. 858 (1989) 8

Gray v. *Mississippi*,
481 U.S. 648 (1987) 9, 10

Neder v. *United States*,
527 U.S. 1 (1999) 10, 13

Nguyen v. *United States*,
539 U.S. 69 (2003) 9

Peters v. *Kiff*,
407 U.S. 493 (1972) 9

Pointer v. *United States*,
151 U.S. 396 (1894)..... 7

Powers v. *Ohio*,
499 U.S. 400 (1991)..... 6, 12

Rose v. *Mitchell*,
443 U.S. 545 (1979)..... 9

Ross v. *Oklahoma*,
487 U.S. 81 (1988)..... 6, 7, 9, 10

State v. *Rivera*,
879 N.E.2d 876 (Ill. 2007)..... 6

Stilson v. *United States*,
250 U.S. 583 (1919)..... 6

Strauder v. *West Virginia*,
100 U.S. 303 (1880)..... 6, 12

Swain v. *Alabama*,
380 U.S. 202 (1965)..... 6

United States v. *Am.-Foreign S.S. Corp.*,
363 U.S. 685 (1960)..... 9

United States v. *Martinez-Salazar*,
528 U.S. 304 (2000)..... 4, 5, 7, 8

United States v. *Wood*,
299 U.S. 123 (1936)..... 6

Vasquez v. *Hillery*,
474 U.S. 254 (1986)..... 6, 9

Wingo v. *Wedding*,
418 U.S. 461 (1974)..... 9

STATUTES

28 U.S.C. § 2243 8

OTHER AUTHORITIES

Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors From the Use of Race-Based Peremptory Challenges By Defense Counsel*, 64 U. Chi. L. Rev. 1311 (1997) 11

U.S. Const. amend. VI 5, 6, 7

U.S. Cons. amend. XIV 2, 11, 12, 13

INTRODUCTION AND INTEREST OF AMICUS CURIAE

The position advanced by Petitioner would create a sweeping expansion of the category of "structural error" in criminal prosecutions. If this position were to be accepted, every violation of state law that impacts the makeup of a criminal jury would gain the status now reserved for the most fundamental violations of the U.S. Constitution violations which, no matter how harmless, automatically require that the conviction be reversed. As the State's brief explains, this position has no basis in this Court's cases and, indeed, threatens to federalize rights that the States have created and should be allowed to define. The National District Attorneys Association, as amicus curiae,[1] submits this brief to alert the Court of the impact its decision may have on prosecutors, their efforts to prosecute defendants fairly and expeditiously, their ability to defend against defendants' misuse of peremptory challenges, and their ability to assert and protect the rights of jurors themselves.

The National District Attorneys Association ("NDAA") is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and amicus activity have carried out its guiding purpose to serve as "the Voice of

[1] The parties have consented to the filing of this brief. As required by Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part. Further, no person other than Amicus, its members, and its counsel made any monetary contribution to further the preparation or submission of this brief.

America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People."

A ruling in Petitioner's favor would have serious practical implications for criminal prosecutions in courthouses across this nation. For the reasons described below, such a ruling would give criminal defendants a powerful incentive to assert peremptory challenges that are close to the line drawn in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and its progeny. By asserting a questionable peremptory challenge, a defendant could invite a close ruling based on *Batson* and thus set the stage for a finding of structural error on appeal.

Moreover, a decision in Petitioner's favor here would put prosecutors in an untenable position. When a criminal defendant asserts a discriminatory peremptory challenge, the responsibility falls to the prosecutor and the trial judge to assert and protect the juror's Fourteenth Amendment right to serve without discrimination. Indeed, this Court's cases have expressly recognized that both the defense and the prosecution have standing to assert *Batson* rights, even though such rights properly belong to the challenged jurors themselves. Before objecting to a peremptory challenge on *Batson* grounds, however, a prosecutor operating under Petitioner's rule would have to assess the strength of the argument in a new way, considering the risk of reversal by a later court on appeal. To protect the conviction, the prosecutor would have an incentive to reserve *Batson* objections for only the most obvious and overt instances of juror discrimination. The result will ultimately be *more* discrimination in the use of peremptory challenges unless States choose to abandon the practice of peremptory challenges altogether.

NDAA urges this Court to decline to expand the category of structural error in the manner Petitioner seeks. Indeed, where no federal right is at stake, it is the state courts not this Court that should determine whether a particular trial court error is subject to review for harmlessness. That is what the Illinois Supreme Court did here, and its decision should be affirmed.

STATEMENT

Eight years ago, Petitioner was prosecuted for the murder of sixteen-year-old Marcus Lee. During jury selection, defense counsel exercised a peremptory challenge against prospective juror Delores Gomez. The trial court concluded that the peremptory challenge was discriminatory and improper under *Batson*, and it allowed Ms. Gomez to be seated as a juror. At the conclusion of Petitioner's trial, the jury found him guilty of first-degree murder, and the trial court sentenced him to 85 years in prison. The conviction was upheld on appeal.

Later, the Illinois Supreme Court concluded that the trial court had misapplied *Batson*. In other words, the court concluded that the peremptory challenge by the defendant presented no issue under *Batson* after all and that the defendant should have been allowed to excuse Ms. Gomez from the jury. Nevertheless, the court concluded that the error had been harmless, as the evidence of Petitioner's guilt was so overwhelming that no reasonable juror could have reached any other result.

Today, Petitioner contends that his conviction should be reversed outright because of the trial court's error in denying him his state law right to excuse Ms. Gomez. The implications of this argument,

however, extend well beyond this individual case. Petitioner's argument is not limited to cases where the trial court applies *Batson* too enthusiastically; his position would make *any* erroneous denial of a peremptory challenge or any other error of state law that impacts the composition of the jury a structural error of federal constitutional dimension. As discussed further below, this position has no support in this Court's cases, and accepting it would impair prosecutors' ability to balance and carry out their various roles at trial, including to protect jurors from discrimination by defendants and to preserve the integrity of the conviction and the criminal process.

ARGUMENT

This Court has defined structural errors as those "constitutional deprivations * * * affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). A trial judge's erroneous denial of a defendant's peremptory challenge does not fall within this limited category of constitutional deprivations. As this Court has repeatedly acknowledged, peremptory challenges are "auxiliary" and "not of federal constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 311 (2000).

Accordingly, under this Court's cases, the good-faith denial of a peremptory challenge should not implicate the U.S. Constitution at all, much less create structural error that requires reversal as a matter of federal law. To hold otherwise would be to create serious practical problems for prosecutors. If States choose to continue offering defendants the right to exercise peremptory challenges and it is not clear

that they would Petitioner's rule would give defendants an increased incentive to exercise discriminatory peremptories, while also impairing the prosecution's ability to stop them.

I. Petitioner's argument seeks an unprecedented expansion of the concept of "structural error," extending it to include the deprivation of any *state law* right that impacts the jury's composition.

In terms of jury composition, the Sixth Amendment guarantees impartiality but nothing more. See U.S. Const. amend. VI. In other words, while a defendant has a constitutional right to exclude a biased or potentially biased juror for cause, he does not otherwise have a constitutional right to select or excuse any particular juror. On that basis, this Court has recognized repeatedly that a criminal defendant has no constitutional right to a peremptory challenge. See, *e.g.*, *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307, 311 (2000) (peremptory challenges provided under federal statute "are not of federal constitutional dimension").

Although a State may elect to provide defendants with the right to excuse jurors without cause through peremptory challenges, that right remains within the bailiwick of the State, as long as the challenge is not used in a way that implicates the juror's rights under *Batson*. Indeed, a State may eliminate peremptory challenges altogether without impairing the defendant's Sixth Amendment rights. *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) ("[I]t is important to recall that peremptory challenges are not constitutionally protected fundamental rights * * *. This Court repeatedly has stated that the right to a per-

emptory challenge may be withheld altogether" without implicating Sixth Amendment rights) (citing *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965); *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1948); *United States* v. *Wood*, 299 U.S. 123, 145 (1936); and *Stilson* v. *United States*, 250 U.S. 583, 586 (1919)); see also, *e.g.*, *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (peremptory challenges provided under state statute "are not of constitutional dimension"); *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986).

Where a peremptory challenge is used in a discriminatory fashion, the juror suffers unconstitutional discrimination, no matter who exercised the challenge. *Cf. McCollum*, 505 U.S. at 47-50 (stating that when subjected to an unconstitutionally discriminatory challenge, the open and public discrimination jurors suffer is a harm inflicted regardless of who invoked the challenge) (citing *Powers* v. *Ohio*, 499 U.S. 400 (1991); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991); *Batson*, 476 U.S. at 87; and *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880)). Thus, under this Court's cases, the Constitution is implicated only when a peremptory challenge is used *improperly* not when it is used *properly* but is impeded by an error in the trial court.

In other words, as long as the improperly included juror was not subject to removal for cause[2] and was

[2] Although Petitioner's brief hints to the contrary, there is no significant risk that Ms. Gomez became biased due to the peremptory challenge and the court's subsequent ruling, as the discussion about the potential for discrimination took place outside her hearing. See *State* v. *Rivera*, 879 N.E.2d 876, 879-880 (Ill. 2007) (reviewing and quoting *voir dire* transcript); 852 N.E.2d 771, 774-76 (Ill. 2006) (reviewing and quoting *voir dire* transcript in detail); 810

not otherwise improperly biased or prejudiced, there is no relevant federal constitutional distinction between the jury as seated and the jury the defendant would have preferred. See *Martinez-Salazar*, 528 U.S. at 316; *Frazier*, 335 U.S. at 507; *Pointer* v. *United States*, 151 U.S. 396, 408-12 (1894) (emphasizing that impaneled jury was duly qualified and impartial). The Illinois Supreme Court concluded that *Batson* was not implicated here at all, and as a result, no federal constitutional issues are at stake. Even for Ms. Gomez herself, the trial court's ruling erroneously *over*-protected her rights under the U.S. Constitution. By definition, that error did not impair any federally protected right. Thus it is state law not federal law that should determine whether to analyze the trial court's error for harmlessness.

To accept Petitioner's "structural error" argument would be to federalize a wide range of state law rights related to the composition of the jury. Indeed, the fact that the error here related to *Batson* has nothing at all to do with the issue before the Court. The error could as easily have been a counting error an error in determining how many peremptory challenges state law allows[3] or an error about a juror's qualifi-

N.E.2d 129, 131-32 (Ill. App. Ct. 2004) (summarizing facts). And, if a juror's mere knowledge of defendant's attempt to excuse her were, by itself, sufficient to create risk of bias, then a defendant could *create* "cause" merely by asserting it.

[3] This obvious implication of Petitioner's argument cannot be reconciled with this Court's rulings in *Ross* and *Martinez-Salazar*. These cases make clear that even if a trial court's counting error resulted in the loss of a peremptory strike in violation of state or federal law, such would amount to structural error *only if* the defendant's Sixth

cations under state law. The upshot would have been the same: the defendant would have been denied a jury constituted within the specific parameters set by state law. If that is a "structural error" under the U.S. Constitution, then nearly any error of state law that relates to the composition of the jury would provide the defendant with a basis to upset his conviction. The result would be much greater uncertainty in state law convictions and a serious encroachment on the ability of state governments to grant, interpret, and even take away procedural rights over and above what the U.S. Constitution requires.

The cases Petitioner cites in support of his argument are not to the contrary. Each case addresses either a fundamental problem with the power of a *federal* tribunal, a biased adjudicator, or a state court jury selection process that (unlike this one) *did* involve unconstitutional discrimination. See, *e.g.*, *Go-*

Amendment right to an impartial jury was violated. *Ross*, 487 U.S. at 85, 88-91 ("[T]he 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides. * * * Even then, the error is grounds for reversal *only if* the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.") (emphasis added); see also *Martinez-Salazar*, 528 U.S. at 317 (defendant's right to peremptory challenges under federal statute not denied or impaired where defendant chooses to use a strike to remove a juror who should have been removed for cause). Regardless, in this case, although Ms. Gomez was seated, there is no dispute that Petitioner was afforded the opportunity to use the full number of peremptories allotted under state law, including a re-exercise of a strike ("backstrike") provided by the trial court after Petitioner's challenge to Ms. Gomez failed.

mez v. *United States*, 490 U.S. 858, 875-76 (1989) (delimiting the powers of federal magistrates under 28 U.S.C. § 2243); *Wingo* v. *Wedding*, 418 U.S. 461, 472-74 (1974) (same); *Nguyen* v. *United States*, 539 U.S. 69, 79-80 (2003) (composition of appellate panel violated congressional limits on powers conferred under Article III); *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960) (same); *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986) (holding that remedies other than reversal of conviction would be ineffectual in deterring systematic racial discrimination in jury selection) (citing *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979)); *Peters* v. *Kiff*, 407 U.S. 493, 498 (1972) (overturning the conviction of a white defendant where African-Americans were systematically excluded from the jury because such violated the Constitution and federal law criminalizing discrimination in jury selection). None of these cases support the federalization of state rights that may be established and eliminated without implicating the U.S. Constitution.

As a matter of prudence and common sense, it cannot be that every error by a state judge in administering state processes that impact jury selection would amount to a structural error under the federal Due Process clause. And this Court has already so held. *Ross*, 487 U.S. at 86-87 (finding no structural error where the defendant used up one of his peremptory challenges to remove a juror who should have been removed for cause). In *Ross*, the Court expressly rejected the idea that a conviction must be reversed merely because an error may have changed the composition of the jury. *Ibid.* In so ruling, the *Ross* Court limited *Gray* v. *Mississippi*, 481 U.S. 648 (1987), in which the Court had previously determined that the defendant's right to an impartial jury was

violated when the trial court improperly excluded a juror who was generally opposed to the death penalty but also stated she could impose it in appropriate circumstances. The *Ross* Court also noted the dissent in *Gray*, which commented that a rule similar to the one now advanced by Petitioner would "def[y] literal application," as it would require a trial judge, upon realizing an error, to dismiss the entire venire and start anew, certainly impacting the composition of the jury. *Ross*, 487 U.S. at 88 n.2 (citing *Gray*, 481 U.S. at 678 (Scalia, J., dissenting)).

Certainly, as to errors of state law, the harmless error standard strikes an appropriate balance between "society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made." *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983)). And in any event, the State has the power to decide the consequences when a defendant has been denied a right that the State itself created. Here, according to the Illinois Supreme Court, an error that results in the wrongful deprivation of a peremptory strike will not result in reversal if the error was harmless. Nothing in the U.S. Constitution requires a different standard.

II. Accepting Petitioner's position would distort the incentives of the parties with respect to *Batson* and peremptory challenges and would create significant practical difficulties for prosecutors.

Petitioner's novel theory that *any* trial court error impacting jury composition creates structural error will result in two highly undesirable practical out-

comes, fundamentally at odds with the purpose of *Batson* and its progeny.

First, under Petitioner's proposed rule, criminal defendants would have a powerful incentive to exercise peremptory challenges that approach and even cross the *Batson* line, because any error by the court in response to such a *Batson*-suspect peremptory strike could provide a way to undo the entire conviction. Permitting *Batson* to be used as a sword by defendants, rather than as a shield for jurors, would work to unravel the constitutional fabric from which *Batson* was created. *See* Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors From the Use of Race-Based Peremptory Challenges By Defense Counsel*, 64 U. Chi. L. Rev. 1311, 1312-13 (1997) ("[E]xcluded jurors are best served by a rule that does not encourage defendants to violate jurors' equal protection rights.").

Second, when faced with such *Batson*-questionable peremptory strikes, Petitioner's proposed rule would leave prosecutors in an untenable position, forcing them to weigh the Fourteenth Amendment rights of a challenged juror against the risk that raising a *Batson* argument could create structural error requiring reversal of the conviction. The specter of reversible error would thus encourage prosecutors to reserve *Batson* arguments for only the most egregious, clear-cut instances of discrimination leaving harder or closer instances of discrimination unremedied.[4]

[4] As this case demonstrates, trial judges too may find themselves in the same untenable position, with an incentive to stop a discriminatory peremptory strike only when the evidence of discrimination is clear-cut and undeniable.

As this Court has explained, "discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411 (quotations and citation omitted). See also *McCollum*, 505 U.S. at 49-50 ("Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, [it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justices our citizens' confidence in it.") (quotations and citation omitted); *Edmonson*, 500 U.S. 614 (1991); *Batson*, 476 U.S. at 87; *Strauder*, 100 U.S. at 308. Nor does any question remain that jury selection and the exercise of peremptory strikes can be a hotbed of discrimination. See, *e.g.*, *McCollum*, 505 U.S. at 46-47 (reciting the history of the Court's battle against discrimination in the jury selection process); *Batson*, 476 U.S. at 84-88 (same). Through this Court's unwavering focus on the rights of the venireperson, *Batson* has been extended to encourage the protection of jurors' Equal Protection rights in all cases and without regard to the race or gender of the party exercising the peremptory challenge. *See, e.g.*, *McCollum*, 505 U.S. at 50 (extending standing to the State to challenge defendant's racially motivated peremptory challenges); *Powers*, 499 U.S. at 411 (rejecting requirement that defendant and challenged juror share the same race); *Edmonson*, 500 U.S. at 630 (extending *Batson* to civil proceedings).

Prosecutors the literal embodiment of the State in criminal trials should be enabled and encouraged to serve *Batson*'s objectives. If, as *Batson* first held, a defendant can stand in the shoes of the discriminated

Given the nature of peremptory challenges, few cases are so clear-cut.

juror to raise her Fourteenth Amendment rights, certainly it is proper that the State's own representative do the same. And *McCollum* made clear that prosecutors have the legal standing to do so. 505 U.S. at 50. The interests of a prosecutor and an improperly excluded juror are aligned: they both seek to prevent the defendant from illegally discriminating against the juror for the purpose of gaining an improper advantage. Accepting Petitioner's position would make it far more difficult for prosecutors to serve this vital role.[5]

In sum, Petitioners' proposed rule will encourage defendants to exercise constitutionally questionable peremptory challenges and simultaneously discourage prosecutors from asserting *Batson* to protect jurors' Fourteenth Amendment rights. Ultimately, such a rule would undermine the fundamental fairness and integrity of criminal proceedings the very things *Batson* aimed to protect. As this Court warned in *Neder*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neither this Court's cases nor common sense supports such a rule in this context.

[5] This reasoning applies with equal force when considering a trial court's *sua sponte* review of peremptory strikes on *Batson* grounds. Indeed, judges too should "actively protect the interests of jurors by initiating *Batson* hearings *sua sponte* whenever the circumstances would permit a prosecutor to do so. This *sua sponte* obligation will also enhance the integrity of the criminal justice system by signaling the courts' commitment to uphold the Constitution." Fried, *supra* p. 11, at 1312-13.

CONCLUSION

For all these reasons, NDAA respectfully urges the Court to affirm the decision of the Illinois Supreme Court.

Respectfully submitted.

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Counsel of Record
MARGARET C. DAUN
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60622
312-558-5600

Counsel for Amicus

JANUARY 2009